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The Lawless Spirit
A Portrait of the Person in English Criminal Law

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THE LAWLESS SPIRIT:
A Portrait of the Person in English Criminal Law

Thomas Goldup

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requirements for the degree
of Doctor of Philosophy in Laws Research**

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ABSTRACT

This thesis is an historical analysis of the concept of the abstract individual in English criminal law, exploring its origins and subsequent development in order to establish a clearer understanding of its place within the modern legal order. It argues that the abstract individual was forged in the coming together of community and positive law in the foundation of criminal law, a process developing from the seventeenth century onwards. The abstract individual emerges as a technique through which the order of the criminal law characterised by the use of positive law within its practices realises itself as part of the life of the community. By locating responsibility in abstract states of mind, a conceptual distinction is imposed between criminality and its manifestation in external actions which both differentiates criminality from the direct perception of the community, whilst necessarily drawing upon that perception in order to make such criminality appear. Located at the point where criminality as constituted within the perception of the community meets with its constitution in reference to interests protected by positive enactments, the abstract individual represents the archetypal image of dangerousness within the order of modern criminal law – or, in other words, the lawless spirit. Uncovering the abstract individual's instrumental quality indicates a possible way of overcoming difficulties faced in the current literature locating the supposedly moral foundation of the abstract individual in relation to modern criminal law's governing function.

The historical analysis conducted in this research contains three main components. The first traces the emergence of abstract thought about the person in criminal legal practices, revealing its association with the breakdown of an assumption of the unity of legal and natural order and the increasing differentiation of the two. The second identifies this

vision of legal order as part of the common law concept of the nature of law and legal authority developing in the seventeenth century, locating abstract thought about the person as part of the life of the community. The third traces the emergence of the abstract individual in criminal law doctrine, highlighting its role as part of an attempt to assert the jurisdiction of the criminal law more effectively over an increasingly complex social environment by representing conduct dangerous to newly recognised interests within the order of the criminal law.

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INTRODUCTION

The abstract individual remains one of the central and contested images of modern criminal law. The figure of the abstract individual is at the core of both expository and normative accounts of the criminal law. On the one hand, the image of individuals as having the capacity to reason and choose their own actions in abstraction from the particular context they may find themselves in informs the conceptual schema through which most expository work analyses the body of criminal law as well as imbuing it with a rational and coherent structure.¹ On the other hand, the abstract individual as the bearer of rights against the state and others within the community underlies many of the principles employed to critique doctrine and determine the boundaries of criminalisation, thereby putting in place the justificatory foundation for the use of coercive force.² Although distinguished by differences in their overarching purpose, both expository and normative accounts of criminal law are united by their shared commitment to placing the abstract individual at the heart of their theoretical enterprise.

If the abstract individual is at the core of these broadly liberal accounts of criminal law, it also occupies the attention of those seeking to develop a critical perspective on

¹ The modern standard in this expository tradition is arguably Glanville Williams, *Criminal Law: The General Part*, 2nd ed. (London: Stevens & Sons Ltd, 1961).

² This normative approach underpins Hart's focus on capacity in criminal responsibility: H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Oxford University Press, 2009); Andrew Ashworth is arguably the leading contemporary proponent of this approach: Andrew Ashworth, *Principles of Criminal Law* (Oxford; New York: Oxford University Press, 2009).

criminal law. The key ambition of many of these critical accounts is to question the nature and status attributed to the abstract individual in the exposition and evaluation of criminal law in liberal theory. This ambition manifests itself in many different forms. One form is the simple empirical observation that it is not easy, on the face of it, to see the abstract individual at the core of a large proportion of actual offences. Although the most obvious example of this challenge may be found in those regulatory offences employing strict liability where the defendant can be made liable without inquiring into their state of mind, the employment of objective standards of *mens rea* within traditional common law offences – such as objective recklessness or negligence – arguably also undermines attempts to position the abstract individual at the core of criminal law. Moreover, whereas an account of criminal law with the abstract individual at its core would seemingly gravitate towards requiring correspondence between *mens rea* and *actus reus* in order to present the defendant as responsible for each aspect of her conduct considered criminal, very few offences in fact live up to this standard.

Although assessing expository or normative accounts of criminal law against the reality of criminal law doctrine and practice may pose questions of the former, which it needs to account for if it is to be a convincing representation, it does not in itself necessarily challenge the coherence of the liberal perspective that places the abstract individual at its core. Liberal theories of criminal law are seemingly well-equipped with the conceptual resources to reconcile the multiplicity of non-subjective doctrines for attributing liability with the overall rational structure of criminal law and an overarching concern for the abstract individual.³ A more fundamental challenge is made by conceptual critique of the abstract individual itself. The objective of such critique is often to expose the indeterminacy of the analytical distinctions presumed by those who place the abstract individual at the heart of criminal law's supposedly rational structure or normative claims. Such a strategy has been employed, for example, to highlight the fluidity of the distinction in doctrine between intention and motive, where it is shown that what act or result is deemed to be

³ See, for example, Brudner's attempt define the proper sphere of fault and strict liability offences in Alan Brudner, "Agency and Welfare in the Penal Law," in *Action and Value in Criminal Law*, 2nd ed. (Oxford: Clarendon Press, 1996); and Ashworth's development of a "minimalist" approach to criminalisation grounded upon individualist principles in Ashworth, *Principles of Criminal Law*, chap. 2.

intended in the narrow, factual sense by the defendant is significantly influenced by a moral evaluation of their wider motive.⁴ Similar claims have been made concerning the normative claim that liability should only be attributed where a temporal coincidence of *actus reus* and *mens rea* can be established. It has been argued by some that the creativity needed by the courts in finding a coincidence between *actus reus* and *mens rea* in certain circumstances highlights potential uncertainties in the analytical distinction itself.⁵

The underlying theme of these arguments is to question the dualistic perception of human nature based upon a neat distinction between the internal world of thoughts and external world of actions presumed by those who place the abstract individual at the heart of the rational structure and normative foundations of modern criminal law. The strong critical claim is not that judges, lawyers and academics have merely erred or been disingenuous in their reasoning when developing and applying these concepts centred upon the distinction between mind and act. Criticism of this nature would not challenge the mind-act distinction itself or the dualistic view of human nature which underpins it, but would presume that uncertainty or inconsistency in doctrine can be overcome by more incisive analysis. The claim is the stronger one that the operation of these concepts in legal doctrine is to some extent necessarily indeterminate and, moreover, that this indeterminacy has its origins in the nature of the mind-act distinction presupposed in the abstract individual.⁶ Rather than doctrinal uncertainty being a product of flawed reasoning in the development and application of particular concepts, the critical perspective claims that such a dualistic vision of human nature is, for one reason or another, itself incapable of informing those concepts necessary to construct a rational, coherent and determinate body of law. In other words, it suggests a crisis in those accounts of criminal law with the abstract individual at their core.

⁴ See, for example Alan W Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge; New York: Cambridge University Press, 2006), chap. 3.

⁵ One of the most celebrated examples of this critique is to be found in Mark Kelman, "Interpretive Construction in the Substantive Criminal Law," *Stanford Law Review*, no. 33 (1981): 591; An overview of the problem of correspondence in criminal law doctrine is given in Celia Wells and Oliver Quick, *Reconstructing Criminal Law: Text and Materials*, 4th ed. (Cambridge: Cambridge University Press, 2010), 117–119.

⁶ For an example of a critique of the mind-act distinction in criminal law doctrine from the perspective that it fails to take into account the complexity of human conduct, see Wells and Quick, *Reconstructing Criminal Law: Text and Materials*, 104–117.

One response to this crisis has been to raise more general, methodological questions concerning the identification and development of concepts to explain the attribution of liability in criminal law. The focus on the abstract individual in criminal law theory has been seen as a symptom of its narrow view in respect to its field of study, either focussing on the doctrinal analysis of a narrow range of offences or analysing the concept of responsibility through the use of primarily philosophical methods at the expense of any thorough empirical investigation. As such, the methods employed by these types of analysis means the concepts they develop can be questioned for the extent to which they in fact respond to actual criminal legal practices, and whether the image of modern criminal law resulting from these methods marginalise important aspects of it, the uncovering of which could be key to establishing a more realistic account of modern criminal law and a position from which to critique its practices.⁷ One example of such an attempt to expand the methodological horizon of criminal law theory has been to take criminalisation as an object of inquiry, requiring the theorist to look beyond the formal law and view the effects of criminal law as part of a wider social phenomenon in which particular individuals and groups come within the purview of the criminal justice system.⁸ A concern with criminalisation involves the analysis of a multiplicity of practices involving a network of state and non-state institutions, agencies and actors united in their general concern with identifying and dealing with ‘criminal’ behaviour. From the perspective of a theory of criminalisation, concepts must not only account for the internal rationality of legal doctrine, if they must do at all, but moreover be sensitive to the wide array of practices through which the criminal justice system deals with defendants, including the formal attribution of liability in the courts. This call for a greater sensitivity to practices outside the court room, as well as those practices within the court room not directly concerned with the formal law, demands deeper reflection on, for example, how procedural and evidential rules interact with substantive rules of liability, as well as a closer examination of how pre-trial and post-trial practices

⁷ These methodological flaws of traditional criminal law theory are explored by Lacey in Nicola Lacey, “Contingency, Coherence and Conceptualism: Reflections on the Encounter between ‘Critique’ and ‘the Philosophy of the Criminal Law,’” in *Philosophy and the Criminal Law: Principle and Critique*, ed. Antony Duff (Cambridge, UK: Cambridge University Press, 1998), 9–59.

⁸ Criminalisation is a broad topic, with its origins arguably in sociology rather than legal theory. A good overview of the current debate is provided in the edited collection Antony Duff et al., eds., *The Boundaries of the Criminal Law* (Oxford; New York: Oxford University Press, 2010).

indicate patterns in the attribution of responsibility not immediately perceptible in doctrine itself, or which throw light on how doctrine is realised in practice. From the perspective of a theory of criminalisation, concepts illuminating criminal law are not purely intellectual exercises to uncover the rational structure of doctrine or develop a set of abstract moral principles against which it can be justified or criticised, but must reflect and illuminate the practices that make up criminalisation as a very real and concrete social phenomenon.

Whilst these critical perspectives may generate important insights into place of the abstract individual in the order of criminal law and the manner in which it operates in its practices, taken by themselves they arguably provoke as many questions as they answer. Whilst a philosophical critique may reveal uncertainties or contradictions in the concept of the abstract individual, the question arises as to why those doctrines informed by it rose to prominence in the first place and why they continue to dominate certain aspects of criminal law practice. Given the value generally attributed to rationality and coherence in the law, why are doctrines which arguably invite irrationality and incoherence persisted with? Also, if the abstract individual only features in a relatively small range of practices, why does it continue to figure so prominently in modern doctrinal and theoretical accounts of the criminal law? Again, given the ambition of such accounts to uncover the underlying rationality of the criminal law in order to represent its overarching system and coherence, why do such accounts appear to marginalise such large number of practices which have important consequences for those subject to it? Purely philosophical or empirical critiques are seemingly limited in their ability to answer such questions, and as a result arguably overlook something crucial in the nature of the abstract individual itself.

In an attempt to answer such questions, one approach which can be adopted is to contextualise the insights generated by these critiques of the abstract individual. Whilst such contextualisation can be approached from the perspective of any number of disciplines, such as sociology, political philosophy or social theory, a particularly fruitful approach, and the one which this thesis adopts, is that of history. The advantages offered by adopting an historical approach are many. Whereas other disciplines may impose certain

methodological constraints limiting the ‘fullness’ of the picture they develop, historical analysis by its very nature arguably requires one to draw from a wide range of disciplines. Historical analysis does not only involve the study of materials, but also an interpretation their meaning. As the story told by such materials is arguably never self-evident, this task of interpretation asks the observer to draw upon any number of disciplines in order to construct their meaning and locate them within a wider narrative. Following from this, another reason to pursue an historical analysis lies in the nature of the object under examination. Given the seemingly universal character of the idea of law, its persistence throughout history of societies, the infinite number of social and political functions it has been put towards, and the infinite number of meanings it has been invested with, a discipline like history which allows one to draw relatively freely from other intellectual resources seems uniquely appropriate. Whilst a discipline with tighter methodological constraints may enable one to develop deep insights into a problem from a particular perspective, the narrowness of the perspective will arguably fail to capture the versatility of law and as such could miss something important to the problem. Finally, as will be seen in Chapter One, a rich body of literature has already developed around the historical analysis of the abstract individual from which this thesis can draw in developing its own argument. The blend of history, legal analysis, social theory and political philosophy to be found in the prevailing literature provides the perfect foundation upon which an argument which aims towards originality and insight can be built.

Chapter One starts with an overview of the prevailing literature in which the debate surrounding the origins of the abstract individual is outlined and the key perspectives within that debate identified. It is seen that analysis of the origins of the abstract individual is closely tied to more general arguments concerning the historical development of modern criminal law. With this in mind, two perspectives are identified – one identified with Norrie and Ramsay, and the other with Farmer and Lacey. Norrie and Ramsay highlight the origins of modern criminal law as a form of social control associated with the emergence of the liberal state. In doing so, both argue that one of the most prominent features of criminal law is its ideological quality, insofar as it claims to secure individual justice in its form despite the fact that in its substance it perpetuates socio-economic inequality. By contrast,

Farmer and Lacey highlight the role played by criminal law in securing and maintaining public order. Farmer in particular illustrates how throughout the nineteenth century the criminal justice system was increasingly transformed into an instrument of the administrative state in which its practices were geared towards the implementation of policy and the quick and efficient processing of cases, whilst Lacey brings forward how these practices were shaped by the need to coordinate knowledge and values where resources available to the courts were limited. Both question the priority afforded to the question of legitimacy by Norrie and Ramsay in their arguments, suggesting that in doing so other important dynamics may be overlooked. The second part of the chapter goes on critically analyse these perspectives, focussing in particular on the concept of the abstract individual developed therein. Although tensions are outlined in the accounts provided by each perspective, suggesting in particular that neither fully captures the normative force of the concept of the abstract individual in modern criminal law, the analysis also identifies how the perspective of each author has been shaped by the relationship between criminal law and positive law on the one hand and community and the common law on the other. Whilst the authors covered in this analysis posit these themes in opposition to each other, the historical analysis conducted in the thesis is guided by the possibility of their interaction.

The substantive historical analysis begins in Chapter Two with an exploration of the emergence of abstract thought about the person in criminal legal practices. This is conducted through an analysis of the Treason Trials Act 1696, an important landmark in legal history for its enshrining of certain procedural rights, in particular the right to defence counsel and the granting of a copy of the indictment. The chapter begins with a challenge to the view prevalent in the current literature on the Act which directly links the reforms it enacted with a desire to defend the accused against the power of the state. Picking up in particular on the association some authors have made between these reforms and the growing influence of Lockean individualism during the period, it is argued that this view attributes a more radical quality to such works than they can bear. An analysis is conducted of Locke's *Two Treatises of Government*, in particular the principle of self-defence he develops through it, where it is argued that whilst it may have entailed important consequences for how the aims and purposes of law were envisioned, to interpret it as

endowing the accused with the right to defend him or herself against the state in the context of the treason trial is misguided. Having challenged the dominant view in the prevailing literature, the chapter goes on to develop its own argument concerning the origins of the Act. A detailed analysis is conducted of the treason trial records in the period leading up to the reforms in which it is illustrated how the courts attempts to guard the integrity of the distinction between law and fact which governed much of its practice were frequently undermined, not only by the accused in seeking to gain the assistance of counsel as to matters of fact, but often by the judges themselves. A particularly prominent problem faced by the courts in this regard concerned the nature of the overt-act required by law to declare the accused's treasonous mind, often inviting debate over whether discussion relating to it concerned matters of fact or matters of law. Through an analysis of the law of treason it is shown that this abstract sense of the criminal mind had its origins in the emergence and consolidation of the doctrine of constructive treason in which evaluation of the state of mind of the accused was key in determining whether actions were directed specifically at the king in his role as head of state or not. It is argued that the problems the courts faced had their origins in the emergence of an increasingly abstract conception of the treasonous mind which undermined the traditional view that it was 'naturally declared' by the overt-act, but which instead required an interpretive engagement with the overt-act conducted with a knowledge of the law.

Chapter Three moves away from this focus on the treason trial to look at the emergence of the criminal mind in seventeenth century criminal law more generally and to locate these interpretive practices surrounding the emergence of abstract thought about the person and the vision of legal order of which they were a part within more general philosophical reflections on the sources and authority of English law, locating them specifically within the common law tradition. The chapter begins with an analysis of the emergence of the criminal mind in the writings of Coke and Hale, bringing forward the specific sense of the criminal mind they employ, envisioning it as a fundamentally interpretive concept insofar as it was a source of evidence to be drawn upon in the interpretation and application of general and abstract rules describing conduct deemed criminal. The chapter goes on to locate these interpretive practices surrounding the

emergence of abstract thought about the person within wider developments in understandings of legal order as evidenced in works on legal reasoning and legal method. It is shown that underlying these interpretive practices was an understanding of legal order as increasingly differentiated from natural or traditional order triggered by an appreciation of the increasing complexity and diversity of human society. Rather than assuming a unity between legal order and the order of its environment, these works constitute human behaviour and interactions as a distinct body of knowledge which required interpretive engagement in order to be represented within the legal order. The chapter then goes on to argue that these interpretive practices were associated with a particular customary concept of law developed through philosophical reflections on the common law. Drawing a distinction between a view associated with Coke, Davies and Hedley at the beginning of the seventeenth century, and another with Hale and Selden emerging later in the century, it is argued that the development in the perception of the continuity of the common law's customary foundations evident in the difference between these two perspectives reflected an attempt to account for the prominence of these interpretive practices within their concepts of legal authority. Whilst the identity the Cokean perspective establishes between custom and the common law may have reflected an awareness of human society as the primary object of legal order, the transcendent sense of continuity they attributed to custom in emphasising its unchanged nature assumed a unity between legal order and human society which failed to capture the manner in which such interpretive practices took the latter as a distinct object to be represented within the former. It is then argued that Hale and Selden's work attempts to capture these practices by distinguishing common law from custom, identifying it instead with institutions of which customary usage was evidence. In doing so human society was constituted as an object distinct from the legal order, insofar as customary usage was merely evidence of the institutions of which the common law was comprised, whilst also inseparable from it, insofar as the content of such institutions could only be understood through such customary usage.

Having identified the emergence of abstract thought about the person in the practice of criminal law and located it within the common law vision of legal order developing in the seventeenth century, Chapter Four goes on to demonstrate how the sense

of the criminal mind and the concept of the abstract individual which was emerging throughout the seventeenth century was drawn upon in responding to developments in the eighteenth and early-nineteenth centuries. The chapter explores treatises from the seventeenth century up until the early nineteenth century, including Coke, Hale, Hawkins, East and Russell, focussing specifically on arson and forgery to show how the emergence of the abstract individual in these offences reflected an attempt by the criminal law to assert its jurisdiction more effectively over an increasingly complex social environment marked by a diversification in the types of interests identified as in need of protection, and in doing so drew upon the sense of the criminal mind which it is argued in Chapters Two and Three had its origins in the seventeenth century. It is argued that the increasing tendency in this period to locate criminality in the defendant's state of mind can be seen as an attempt to reflect more effectively within the order of the criminal law conduct dangerous to the interests it identified.

CHAPTER ONE

THE ABSTRACT INDIVIDUAL OF MODERN CRIMINAL

LAW:

HISTORY, IDEOLOGY AND ORDER

1. Introduction

The thesis begins with a critical overview of the prevailing literature which aims at an historical analysis of the abstract individual of modern criminal law. The aims of the chapter are two-fold, mapping on to the two main sections therein. First, an overview is conducted of the prevailing literature in which the different perspectives on the historical development of modern criminal law generally are outlined and the general structure of the debate is established. In this section it will be seen that there are two main areas of division between the authors discussed. First, there are contrasting perspectives on what are to be considered the primary dynamics informing the historical development of modern criminal law. On the one hand, authors such as Norrie identify modern criminal law with the claim to do justice to individuals according to an ideal of liberal individualism emerging from the

eighteenth century period of Enlightenment, albeit this claim is ideological in the sense that it 'masks' through formal and universal language the fact that it protects rights reflecting particular socio-economic interests. On other hand, authors such as Farmer have argued that this focus on individual justice risks overlooking the transformation criminal law underwent with growth of the modern state throughout the nineteenth century. During this period the jurisdiction of the criminal law reached into increasingly diverse areas of social activity, accompanied by a transformation of its practices into instruments for the maintenance of public order through regulation of risky activities and governance of disorderly behaviour.

Underlying this first area of contestation, it is argued that there is a second tension which although less prominent is arguably more fundamental to the inquiry into the historical development of the modern criminal law. Although the different perspectives in the first area of debate attribute different objectives to criminal legal practices, it does not necessarily preclude that these practices are ultimately shaped by the claim to secure values and so be legitimate, a point which as we will see is brought to light by Ramsay's interpretation of what Farmer identifies as practices associated with maintaining public order as the criminal law claiming legitimacy by securing a notion of social rights associated with democratic citizenship. Against this background, the significance of Lacey's claim that criminal legal practices face general problems of coordination and legitimation of values and knowledge comes into light, insofar as in the idea of 'coordination', which also informs Farmer's analysis, it potentially offers a basis for conceptualising an understanding of normative force operating in those practices independent of any claim to legitimacy. The first section concludes however by arguing that Lacey does not necessarily succeed in differentiating coordination and legitimation as dynamics within criminal legal practices.

The second part of the chapter engages more directly with the manner in which the authors considered in the overview see individualism operating in modern criminal law, conducting a critical analysis in order to highlight their strengths and potential limitations. Two perspectives are identified, one with Norrie and Ramsay and the other with Farmer and

Lacey. In relation to Norrie and Ramsay, it is argued that their claim that modern criminal law's individualism is ideological insofar as it masks the substantive interests protected by the law is seemingly limited in its ability to explain the normative force of the doctrines and other legal measures through which it supposedly performs this function. It is shown that the core tenet of Norrie's critique of the *mens rea* doctrines of intent and recklessness as ideological - that these doctrines base their claim to legitimise judgments by excluding substantive considerations arising from the particular harm in question - cannot fully explain how the law develops through the use of orthodox subjectivist terms referring to psychological states of mind. As a result it is suggested that the normative force underlying the use of orthodox subjectivist terms in criminal law doctrine may be more nuanced than the idea of 'exclusion' can account for. With regards to Ramsay, a tension is highlighted between his identifying the claim to legitimacy made for concepts of responsibility in securing civil or social rights on the one hand, and his assertion that the determination of these rights in practice by the positive enactments of political and legal institutions is evidence of their ideological character. It is argued that his initial association of concepts of responsibility with civil and social rights in fact distorts how they operate to claim legitimacy for institutional practices by marginalising the role of the positive law. It is shown on the contrary that the very normativity of civil and social rights in fact presume their determination by political and legal institutions, operating as ways of making claims upon institutions as part of a discourse rather than forming concrete, substantive interests which institutions must act as instruments to secure.

In the other perspective identified, Farmer and Lacey's interpretation of modern criminal law's individualism is informed by their awareness that a large number of practices are guided by a concern to maintain public order or are subject to pressures which inhibit the aim to do individual justice. In this light, the influence of individualism in modern criminal law is identified with a particular tradition of theory focussing on a narrow range of common law offences only. Both attribute to this theoretical tradition a broadly ideological purpose in which the autonomy of the criminal law is defended against its colonisation by administrative practices by presenting it as having an essentially moral foundation in the protection individualist values, investing the courts with the authority to observe and

supervise other areas of practice dominated by more instrumental logics. It is shown that in order to make this argument Farmer and Lacey draw upon two different types of individualism, seemingly at the same time, of which neither can clearly be understood to defend the criminal law in the sense they envision. On the one hand, a communitarian type of individualism is drawn upon in order to present criminal law as having a moral foundation, speaking to the focus of much criminal law theory upon common law offences where, in principle at least, importance is attached to the community's recognition of harm. It will be seen, however, that this implies that practices can be legitimised by their securing of social goals, seemingly replicating the view upon which the instrumental use of practices are justified and against which this form of individualism was meant to defend criminal law against. On the other hand, a highly abstract type of individualism is drawn upon in order to develop those doctrines of general applicability through which the courts could reach into and challenge these instrumental practices. It will be seen again, however, that this implies a view of practices in which legal authority is tied to positive enactment, again replicating the view upon which instrumental practices are justified.

Although the critical analysis in the chapter suggests that perspectives on the individualism of modern criminal law in the prevailing literature are marked by certain limitations, it also draws from them in order to guide the historical analysis conducted in the rest of the thesis. We will see that Norrie and Ramsay draw an important connection between the emergence of the abstract individual in criminal law doctrine and the growing importance of positive law in defining and protecting rights. Their locating the emergence of the abstract individual as part of the process of differentiating legal discourse from traditional practices which located judgments of criminality in the community is an important insight which directs our historical analysis towards observing changing practices in protecting rights, in particular the growing role of the state. On the other hand, Farmer and Lacey bring forward the existence of a multiplicity of practices of varying character in modern criminal law, with the abstract individual to be found as a guiding image in only a narrow area of that practice. Associating the emergence of the abstract individual with the assertion of the criminal law as a specific technique of social ordering by invoking a particular legal tradition, namely the common law, guides our historical analysis towards

examining the possible importance of community and the sense in which law may draw upon it in its practices. The argument developed in the rest of the thesis builds upon the foundations provided by these two important insights into the origins of the abstract individual of modern criminal law, whilst seeking also to overcome the limitations in the prevailing literature which this chapter highlights.

2. Current Issues in Criminal Law Theory

Before moving on to presenting an outline and critical analysis of the prevailing literature on the origins of the abstract individual of modern criminal law, this section will make a justification of the topic selected and the approach taken in the thesis in relation to current issues in criminal law theory. The thesis conducts an historical analysis exploring the origins of abstract thought about the person in English criminal law. In doing so special focus is given to one particular aspect of such abstract thought, namely an evaluation of the liability of the defendant which draws a distinction between internal and external aspects of conduct. The distinction is most prominently recognised in English criminal law by the doctrines of *mens rea* and *actus reus*, respectively requiring proof of both a ‘guilty mind’ and a ‘guilty act’ in determining liability to conviction and punishment. Although the coherence of the distinction suggested by these doctrines may be questioned on analytical and normative grounds,⁹ as well as what forms of liability properly fall within each doctrine,¹⁰ generally speaking the notion of *mens rea* refers to the mental aspect of the defendant’s conduct, including his or her control over or awareness of actions, their attitude towards the actual or potential consequences of such actions, and their knowledge and understanding of the circumstances within which such actions took place. The notion of *actus reus* on the other hand is arguably less precise, but can generally be understood as encompassing all

⁹ See generally, Wells and Quick, *Reconstructing Criminal Law: Text and Materials*, 114–119.

¹⁰ For an introduction to this debate, see David Ormerod, *Smith and Hogan’s Criminal Law*, 13th ed. (Oxford: Oxford University Press, 2011), 152–153; Ashworth, *Principles of Criminal Law*, 185–188; A. P. Simester, J. R. Spencer, and G. J. Virgo, *Simester and Sullivan’s Criminal Law: Theory and Doctrine*, 5th ed. (Portland, OR (USA): Hart Publishing, 2013), 158–159.

those external aspects of conduct manifesting themselves outside the internal mental world of the defendant, including acts and omissions and their actual or potential consequences.

The importance of the distinction between internal and external aspects of conduct informing the doctrines of *mens rea* and *actus reus* to an inquiry into abstract thought about the person in criminal law lies in the potential it has to place the individual as a distinct entity at the centre of judgments of criminal liability. Where a defendant does not have the required state of mind in relation to his or her conduct due to a lack of control, foresight or knowledge, liability is avoided regardless of whether their conduct otherwise constitutes a serious breach of some moral duty owed to other members of the community or seriously interferes with interests otherwise recognised and protected by the law. In principle, therefore, *mens rea* reimagines the substantive boundaries of the criminal law by differentiating criminality from broader moral evaluations of conduct or calculations of the importance of the interest interfered with, requiring proof of facts pertaining to the defendant alone distinct from and irreducible to considerations arising from the moral quality or harmful nature of conduct. The inquiry into the defendant's state of mind required by the doctrine of *mens rea* arguably represents at least one part of the defendant's passage through the criminal justice system in which eventual liability to conviction and punishment turns upon a process in which he or she is taken as an individual as such, and their conduct judged independently of evaluations in light of 'community values' or the security of protected interests.

Whilst the emergence of the concept of *mens rea* and its eventual recognition as a general principle of criminal law are undoubtedly important stages in the development modern criminal law, the decision in this thesis to focus upon it as part of an historical analysis of abstract thought about the person in English criminal law requires some justification. One view may be that, although the emergence of abstract individualism was an important development in the history of modern criminal law, and continues to form an important part of our understanding of contemporary criminal law, the focus on *mens rea* overlooks other doctrines of equal importance as part of the emergence of abstract thought

about the person, meaning any argument developed in the thesis concerning its origins and significance may lack the range of perspective necessary to capture the phenomenon as a whole. Other authors who have addressed similar themes, such as Norrie and Farmer for example,¹¹ engage in detailed historical enquiry and analysis of other core doctrines and the issues arising from them - such as the scope of liability for omissions, principles of causation and the nature of defences - alongside the doctrine of *mens rea*. The basis for inclusion of these other doctrine relies upon the perception that these doctrines form part of the attempt to represent criminal law as grounded in a moral or political individualism which abstracts the defendant from their position within the community by acknowledging and respecting their right to be treated according to their status as autonomous individuals. The abstract concept of the person informing such individualism suggests in turn that any doctrine informed by such individualism must form an important part of the emergence of abstract thought about the person in criminal law more generally.

The decision to focus the historical analysis of this thesis on *mens rea* to the exclusion of other doctrines is not based upon any contestation of the view seemingly underlying these other projects of the role of moral and political individualism in shaping the core doctrines of modern criminal law, including *mens rea* itself. Any attempt to understand the emergence of abstract thought about the person in modern criminal law more generally without considering the role and influence of individualist ideas would be seriously misguided. It is, however, premised upon a certain scepticism concerning whether the arrival of the abstract concept of the person in English criminal law embodied by the emergence of the doctrine of *mens rea* can be too readily identified with the strand of individualism which may have informed the development of other doctrines, and the belief that making such an identification risks overlooking other important aspects of its origins that may give us an insight into conceptual and normative features of the doctrine both historically and today. As will be demonstrated in the thesis, the roots of *mens rea* can be traced to a period before individualist values were consciously reflected in the development and application of these other doctrines, and long before the type of individualism through

¹¹ Lindsay Farmer, *Criminal Law, Tradition, and Legal Order: Crime and the Genius of Scots Law : 1747 to the Present* (Cambridge; New York: Cambridge University Press, 1997); Norrie, *Crime, Reason and History*.

which such doctrines are viewed today could be considered a strong influence within English criminal law. Whilst this alone does not of course say anything about the relationship between moral or political individualism and these core doctrines, it does suggest the possibility of other dynamics lying behind the emergence of *mens rea* in particular.

It is therefore the suggestion of a difference in the story behind the emergence of *mens rea* and the growth and consolidation of individualist values in English criminal law which justifies the focus on the former to the exclusion of those other doctrines commonly associated with the latter. As will be seen, an important aspect of the argument developed in the thesis is that a clearer understanding of the normative force of the doctrine of *mens rea* cannot be captured by a perspective which views it entirely as the embodiment of individualist values, ideological or not. The sense that it stands apart from other individualist doctrines therefore makes an historical analysis of *mens rea* in particular a fruitful line of inquiry in developing the sort of argument the thesis ultimately aims to make. Including other doctrines informed by a individualism whose influence in the development of modern criminal law this thesis ultimately seeks to reassess risks watering-down the originality of the perspective being developed by confusing the project's aim of exploring the emergence of abstract thought about the person in English criminal law for an exploration of individualism as such. Notwithstanding these points, justification for adopting what may appear to be a relatively narrow understanding of abstract thought about the person ultimately lies in the strength of the argument made in the thesis. Moreover, what this argument could contribute to an historical analysis of those doctrines outside the immediate attention of this project is without doubt a potentially fruitful line of inquiry for future research.

Another potential objection to the approach adopted in this thesis maybe that not only is it too narrow with regards to the particular aspect of doctrine which it focuses upon, but that the very focus upon doctrine itself is too narrow to tell us anything meaningful about criminal law and criminal justice. The doctrine of *mens rea*, it may be said, only represents a small and perhaps even insignificant area of the criminal law exercising little

actual influence in the myriad of practices through which individuals actually come into contact with the criminal justice system and are exposed to its sanctions. Regardless of what may be revealed about abstract thought about the person in criminal law through an exploration of the origins and development of this doctrine, merely focussing on this question risks presenting a distorted image of the nature of criminal law itself. It is precisely such concerns which have led to a recent trend within criminal law theory to turn away from focussing on the doctrinal structure of criminal law or the substance of particular offences and towards instead theorising the broader process of *criminalisation*.

Although discussion of criminalisation has been diverse in aims and method, at its core can be said a response to the concern that, especially in the United Kingdom and United States, there is simply too much criminal law and too much punishment, and as a result there is a pressing need to develop sophisticated theories identifying how and to what extent criminal law reaches into our lives and regulates our conduct and what the proper limits upon its reach should be.¹² Whilst interest in criminalisation may have been triggered by relatively recent developments in criminal law - such as the growth of anti-terrorism legislation, the treatment of sexual offenders and the use of civil prevention orders – the ambition of theories of criminalisation in principle go beyond an immediate concern with particular offences or groups of offences. Such an inquiry naturally brings into focus an array of practices bearing upon the likelihood of individuals being subjected to criminal process and eventually sanction, including not only the substantive scope of the criminal law itself, but also methods of policing and enforcement, pre-trial prosecution processes, court procedure, sentencing and punishment, breaking down traditional disciplinary boundaries between criminal law, criminology, political science and sociology in order to find new ways to understand and evaluate our criminal justice institutions.¹³

In light of the admirable and much-needed recognition of the inescapably interdisciplinary and contextual nature of any meaningful understanding of criminal law

¹² Douglas Husak, *Overcriminalization* (Oxford; New York: Oxford University Press, 2008), chap. 1.

¹³ Andrew Ashworth, "Is the Criminal Law a Lost Cause?," *Law Quarterly Review* 116, no. 2 (2000): 225–56.

which the question of criminalisation has brought into view, the focus of this project upon conditions of liability and the doctrine of *mens rea* in particular may appear, by contrast, too narrow. In fact, such focus on the doctrinal structure of criminal law in scholarship and legal education has been labelled ideological precisely insofar as it marginalises the broader phenomenon of criminalisation which arguably fails to respect to the same extent, if at all, those values of individual freedom and formal equality which it is claimed shapes criminal law doctrine. A defence of the value that a detailed exploration of the doctrine of *mens rea* such as that conducted in this thesis can be made on two basis; one speaking to the role that such doctrines have to play in reflecting the normative considerations upon which certain types of conduct are criminalised, the other speaking to how such doctrines actually operate as a part of criminal legal practices and how this can in turn enrich theories of criminalisation.

With regards to the former, regardless of the particular principles or goals favoured by any particular theory of the proper boundaries of criminalisation, this often necessarily involves some form of commitment to not only what type of conduct should be criminalised but how it should be criminalised, and in particular the basis upon which individuals should be made liable for that conduct. In a recent collection of essays on the theme of criminalisation it was stated that such an inquiry must not only ask what is to be criminalised but also how, for “the internal structure of the criminal law should reflect the grounds on which the various types of conduct are criminalised.”¹⁴ The question of how individuals should be held liable for conduct can and has played an important role within those schools of thought which broadly dominate the current landscape of normative theories of criminalisation. On the one hand, for those asserting the harm principle as the primary grounds upon which conduct should be criminalised, whether or not this necessitates some form of advertence to harm caused or risked on behalf of the defendant has long been a matter of debate. Making individuals liable for inadvertently caused harms or risks may *prima facie* contravene the harm principle insofar as it punishes conduct which, by reason of the accused’s inadvertence, could not be prevented. On the other hand,

¹⁴ Duff et al., *The Boundaries of the Criminal Law*, 11.

maintaining the morally wrongful nature of conduct as the primary grounds for criminalisation may also necessitate a commitment to particular forms of liability. Whilst on this perspective it may not be necessary to maintain that a morally wrong act necessarily requires some strong form advertence on behalf of the accused, the different degrees of mental identification with conduct as reflected in the concepts of intention, recklessness and negligence comprising the doctrine of *mens rea* certainly reflect commonly held views about moral blameworthiness of conduct and as such must have an important role to play in any theory which holds the wrongful nature of conduct as a basis for its criminalisation.

It is not however the direct aim of this thesis to make any specific claims about the proper role for the doctrine of *mens rea* within a normatively sound system of criminal law and criminal justice, and as such the contribution it makes to theories of criminalisation at this specifically normative level may be limited. This does not mean however that the analysis and argument of the thesis has nothing to say about criminalisation. A recent review of the nature and scope of theories of criminalisation advised such theories to eschew pretensions to universality and the tendency to treat institutions as abstract entities and instead “begin with the institutions we have..., with the aims that they could be thought to have, with the values and meanings that they could be taken to embody – however imperfectly.”¹⁵ Theories of criminalisation and the proposal of principles for determining its proper boundaries must therefore be grounded in a thorough understanding of the institutions it is analysing and the practices of which they are comprised. One important component of this is to be aware that in dealing with the criminal justice system we are dealing first and foremost with a political institution and therefore must approach it with an understanding that it operates in a political environment committed to liberal and democratic ideals. Another important consideration, and the area in which this thesis can perhaps make its most valuable contribution to the theme of criminalisation, is that we must have a good understanding of how we came to have the institutions we have today, and how and why these institutions have previously taken a different shape to that they take today – in other words, a sensitivity to our institutions as both possessing a history and

¹⁵ Ibid., 9.

currently taking a particular historical form. Whilst a normative theory of criminalisation may conclude that the concept of responsibility expressed by the doctrine of *mens rea* best reflects the principles upon which conduct should or should not be criminalised, if that conclusion is not grounded in an understanding of the waxing and waning of such concepts over time in response to changes in the social and political environment of criminal law and criminal justice then the aims of that theory may be frustrated insofar as the doctrine of *mens rea* and criminal law more generally are being dealt with only as abstract entities and not as actually existing institutions with their own history.

Such a view has been persuasively put forward by Lacey in a number of recent publications, proposing an interpretive framework through which concepts of responsibility in criminal law are presented as responses to problems of coordination and legitimation faced by the criminal justice system at particular points in time.¹⁶ An important outcome of this approach has been to ‘demystify’ the image of criminal law presented by philosophical and conceptual analysis of criminal law doctrine in which attributions of responsibility based upon the capacity of the defendant emerges as a dominant if not defining practice of criminal law. By analysing other component practices of the criminal justice system as well as the law of evidence stipulating how liability is to be proven, Lacey argues that not only have character-based concepts of responsibility continued to occupy an important place within broader processes of criminalisation, even when subjectivist ideas were supposedly at their most influential, but that in recent years we have witnessed a ‘resurgence of character’ in which the particular status of individuals or history of previous convictions or evidence of bad character has emerged as an explicit basis upon which to criminalise within the criminal law itself, a trend she associates with the decline since the 1970s of penal welfarism and its replacement with a political environment dominated by social and economic insecurity and anxiety concerning the threat posed by ‘deviant’ persons or groups, fostering the emergence of an ‘enemy criminal law’ in which such identities are explicitly

¹⁶ Nicola Lacey, “In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory,” *The Modern Law Review* 64, no. 3 (2001): 350–71; Nicola Lacey, “Responsibility and Modernity in Criminal Law,” *Journal of Political Philosophy* 9, no. 3 (2001): 249–76; Lacey, “Contingency, Coherence and Conceptualism.”

targeted.¹⁷ Furthermore, even in those areas of criminal law where capacity-responsibility appears to have long been firmly rooted, the exercise of discretion at other stages of the criminal process and the operation of burdens of proof and evidential presumptions ensure that notions of criminal character have continued to play an important role in determining the boundaries of criminalisation.

In tracing the origin of the doctrine of *mens rea* in English criminal law and relating its emergence within broader developments in the procedure of the criminal courts, methods of legal reasoning and legal philosophy, and the social and political environment of the criminal law, this project is motivated by a concern to question or at least contextualise some of the assumptions that may have informed traditional doctrinal accounts. Moreover, an important aim of the historical analysis conducted is to uncover and make explicit the normative voice with which the doctrine of *mens rea* originally spoke and which may have subsequently been lost, buried beneath the wealth of largely ahistorical philosophical and conceptual analysis of the doctrine produced throughout the twentieth century. A different perspective on the doctrine of *mens rea* is offered, one which it is claimed is more sensitive to the particular historical context within which it emerged as a core doctrine of English criminal law and which can be deployed to temper and modify some of the strong individualist interpretations the doctrine has received and which has alienated analysis of the doctrine from its living history in the law and which may still exercise influence today. It will be seen as the thesis develops how the association between the doctrine of *mens rea* and the ‘lawless spirit’ is premised on the assertion that this doctrine rooted crime and criminality within the perception of the community during a period in which the life of that community was increasingly coming to be ordered and regulated by the general and abstract rules enacted by the state. In a similar vein to Lacey’s work in this area, it problematises certain assumptions about the histories of capacity- and character-based concepts of responsibility in criminal law and their claimed distinctiveness, the ‘lawless spirit’ being in an important sense an evaluation of character yet one in which the capacity

¹⁷ Nicola Lacey, “The Resurgence of Character: Criminal Responsibility in the Context of Criminalisation,” in *Philosophical Foundations of Criminal Law*, ed. Antony Duff and Stuart Green (Oxford: Oxford University Press, 2011).

of the individual plays a prominent role. Insofar as this sheds light on how the doctrine of *mens rea* and the abstract individual it envisions has, to borrow Lacey's framework, coordinated and legitimated criminal legal practices, and to the extent to which this deepened understanding of *mens rea* can be drawn upon in attempts to theorise the boundaries of criminalisation both historically and today, the argument made in this thesis can contribute to the theme of criminalisation even if it does not take the subject of criminalisation as its main aim.

One particular area of focus that has emerged from a growing interest in criminalisation has been the suggestion that criminal law has undergone a 'preventive turn' in recent years, and the corresponding need to develop a theory of preventive justice in response.¹⁸ This trend is marked by the proliferation of offences and practices in criminal law and criminal justice directed towards preventing harm rather than retrospectively convicting and punishing the cause of it. Whilst this question has to a certain extent always been part of modern criminal law since the proliferation of strict liability offences from the nineteenth century onwards, it has been suggested that the contemporary situation is distinguished not only by the quantity of preventive offences but the seriousness of those offences and the severity of the punishment attached to them. For many authors, whilst the 'preventive turn' may call for a re-evaluation of how doctrinal principles operate, it does not necessarily threaten their importance to understanding the conceptual and normative framework of modern criminal law. Whilst preventive offences form one side of liberal criminal law embodying the duty incumbent upon the state to enhance public security by reducing the risk of harm to individuals – long established in other areas of the criminal justice system such as policing, pre-trial detention and sentencing, as well as in measures safeguarding public health or controlling immigration – traditional doctrine forms the other side, exercising principled restraint upon the pursuit of such goals through the criminal law in the creation, interpretation and application of the law.

¹⁸ Andrew Ashworth, Lucia Zedner, and Patrick Tomlin, eds., *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013); Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford: Oxford University Press, 2014); Henrique Carvalho, *The Preventive Turn in Criminal Law* (Oxford: Oxford University Press, Forthcoming).

Others, however, interpret the preventive turn as posing a more fundamental challenge to the doctrinal view of modern criminal law, one which in turn arguably poses a challenge to the approach of this thesis. One of the strongest proponents of this view has been Peter Ramsay, who, as part of a ‘theory of the vulnerable subject’, attempts to locate the preventive turn within a specific historical context and identify grounds upon which an effective critique of this development can be made.¹⁹ His argument suggests that both doctrinal principles and preventive offences draw upon the value of individual autonomy for legitimacy, but do so in a one-sided manner which necessarily presumes the justificatory rationale for its opposite, with the result that the line between protection of formal freedom and public security in criminal law cannot be drawn in the abstract but is ultimately resolved by a political decision informed by evaluation of the interests at stake. The critique of preventive offences informed from the perspective of formal freedom is “one-sided, and ultimately futile” because “the abstract will entails the vulnerability of the subject”, and that such critique “will be grounded on nothing more than the other side of vulnerability,” relying upon “the very category that is the basis of the law that it seeks to critique – the subject of commodity exchange.”²⁰ Ramsay therefore challenges the tendency of liberal theories of criminal law to defend individual autonomy by appeal to the special status of doctrinal principles as restraints upon preventive lawmaking, exposing the manner in which they indirectly reinforce the very ideology justifying those aims they seek to critique and limit. If this argument is correct, the approach in this thesis is potentially undermined by the same historical naivety Ramsay claims undermines the liberal defence of criminal law. For Ramsay, focus on the origins of the doctrine of *mens rea* grounded on the assumption of a special connection between traditional doctrine and abstract thought about the person in criminal law overlooks the more expansive role such thought plays in justifying preventive offences uncovered through the notion of vulnerable autonomy. The notion that the

¹⁹ Peter Ramsay, “The Theory of Vulnerable Autonomy and the Legitimacy of the Civil Preventative Order,” in *Regulating Deviance: Redirection of Criminalisation and the Futures of Criminal Law*, ed. B McSherry, Alan Norrie, and S Bronitt (Oxford: Hart Publishing, 2009); Peter Ramsay, “Pashukanis and Public Protection,” in *Foundational Texts in Criminal Law*, ed. M Dubber (Oxford: Oxford University Press, 2014); Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford: Oxford University Press, 2012).

²⁰ Peter Ramsay, “Towards a Critique of the Vulnerable Subject: Pashukanis and Public Protection,” *LSE Law, Society and Economic Working Papers*, 2013, 23.

doctrine of *mens rea* is uniquely concerned with abstract thought about the person, upon which the approach of this project is premised, therefore reflects a failure to appreciate the fundamental historical unity of formal freedom and vulnerable autonomy as different sides of the same liberal ideology, with the result that it ultimately contributes to a mode of thinking about criminal law which does “no more than reverse the reversed ideology once again” when what is required is “a critique of the contemporary critique of the abstract subject”.²¹

In defending the approach taken in this project one could simply restate the response made to the first hypothetical objection outlined above – that a focus on the doctrine of *mens rea* excludes other doctrines embodying abstract thought about the person and therefore is too narrow to sufficiently capture the phenomenon. As one of the main aims of the argument developed in the thesis is to question certain aspects of the moral or political individualist interpretation others have given of the doctrine of *mens rea*, the challenge posed by Ramsay’s argument to the focus on *mens rea* could be considered to lack bite insofar as it assumes such an interpretation. It could again be said that the clarity of the argument will be better served if it is developed through an understanding of criminal law reflecting this aspect of the argument rather than drawing upon one premised upon an assumed association between abstract thought about the person embodied by doctrine and moral or political individualism. However, such a response alone would not meet the challenge presented by Ramsay’s argument. In order to rethink the relationship between abstract thought about the person and moral or political individualism other perspectives on that relationship must be engaged with. Whilst the focus on *mens rea* may enable sufficient engagement with those who take traditional doctrine as the expression of individualism in criminal law, it does not by itself engage with arguments like Ramsay’s who identify the logic of individualism behind the regulatory and preventive aspects of criminal law and on that basis challenge the unique character of doctrine more generally. Justifying the focus on *mens rea* in this project therefore demands views on the role of abstract thought about the person in criminal law such as Ramsay’s must also be directly engaged with.

²¹ Ibid.

In order to highlight one sense in which traditional doctrine - and *mens rea* in particular – possesses a unique status within criminal law as expression of abstract thought about the person, and the sense in which Ramsay’s argument may overlook this, the rest of this section will engage in a brief overview and analysis of the current debate surrounding preventive criminal law. In an important recent study Ashworth and Zedner review the use of coercive measures aimed at protecting the public from possible harms, examining justificatory arguments claimed to support these practices and exploring restraining principles that may be invoked to limit their use.²² Although covering a wide range of practices within the criminal justice system and beyond, in particular those involving deprivation of liberty, preventive criminal law forms an important part of the study.

Ashworth and Zedner’s discussion of restraining principles is premised upon two common problems perceived as intrinsic to preventive offences: first, the remoteness of conduct criminalised from the harm-to-be-prevented; and second, an undermining of rule-of-law standards by failing to clearly identify the wrong done. The principles identified to deal with these problems are largely drawn from traditional doctrine, with a particular emphasis on fault requirements demanded by the doctrine of *mens rea*. For example, concerning remoteness they state three principles which require, first, that a person should only be criminalised for conduct on the basis of what he or she may do at some time in the future “only if the person has declared an intent to do those further acts”, second, that where conduct is remotely connected the harm-to-be-prevented more generally “there is a compelling case for higher-level fault requirements such as intention and knowledge”, and third that a person should be held liable for the future acts of others “only if that person has sufficient normative involvement in those acts (e.g. that he or she has encouraged, assisted, or facilitated), or where the acts of the other were foreseeable, with respect to which the person has an obligation to prevent a harm which might be caused by the other.”²³ With respect to rule-of-law standards they draw upon Hart’s argument that the principle of *mens*

²² Ashworth and Zedner, *Preventive Justice*.

²³ *Ibid.*, 112–113.

rea forms an important part of those values insofar as it presents criminal law as a guide to conduct by offering individuals a ‘fair opportunity’ to comply with its standards.²⁴

On the face of it the analysis invoked by Ashworth and Zedner supporting these principles may appear grounded in the immediate concern that preventive offences undermine formal freedom, with such principles exercising restraint by challenging the balance between liberty and security struck at the justificatory stage. For example, the remoteness of conduct from harm-to-be-prevented in preventive offences is presented as posing a problem insofar as it shows “insufficient respect for the individual as a moral agent.”²⁵ By criminalising remote conduct the accused is not given the opportunity to change their course of conduct, nor demonstrate that they pose no actual threat of harm. Similarly, reference to *mens rea* is put forward as key to bringing preventive offences up to rule-of-law standards on the basis that it “entails respect for individuals as autonomous subjects” by recognising “that people should be able to plan their lives in order to secure maximum freedom to pursue their interests.”²⁶ With the problems of remote conduct and compliance with rule-of-law standards confronted by preventive offences viewed from the perspective of respect for the individual as a morally autonomous agent, it would seem that principled restraint of such offences aims at limiting the boundaries of criminalisation in order to give individuals greater opportunity act as responsible agents and guide themselves by the right reason of the criminal law. This in turn would suggest that the principles themselves are directed at challenging the balance between liberty and security struck at the justificatory stage by giving more weight to the value of formal freedom at the cost of increasing the risk of harm.

The protection of formal freedom from an increased political willingness to legislate against remote risks of harm irrespective of its moral consequences may indeed be an important motivation behind restraining principles put forward by Ashworth and Zedner.

²⁴ Ibid., 114–115.

²⁵ Ibid., 111.

²⁶ Ibid., 114.

However, the actual substance of the principles they put forward and how they respond to normative problems posed by preventive offences reveals another dimension to them suggesting a different picture of their restraining force. For example, with regards to the principles put forward in relation to the criminalisation of remote conduct, if this practice is perceived as problematic inasmuch as it entails disrespect for the individual as a moral agent by depriving them of the opportunity to be guided by right reason, it is difficult to see how the principle requiring a higher-level fault requirement speaks to this issue or attempts to rebalance it in greater favour of formal freedom. The principle does not touch directly upon the remoteness of the offence and therefore affords the subject no greater opportunity to act responsibly and change their course of conduct.

If the principles dealing with criminalisation of remote conduct fail to truly rebalance such offences in favour of formal freedom and moral agency for being too narrow, then the principles proposed to address rule-of-law issues are conversely too wide. As we have seen, Ashworth and Zedner cite Hart's 'fair opportunity' argument in favour of the proposition that rule-of-law standards require offences incorporate *mens rea* fault elements. They cite further Hart's argument that the value of the *mens rea* principle rests upon the respect it affords to individuals as moral agents by enabling them to plan their lives within the coercive framework of the law and so maximise their freedom to pursue their own interests. On the face of it, the force of the *mens rea* principle as a rule-of-law standard lies in its effects on the formal rather than substantive quality of the criminal law. By ensuring that individuals are only subject to criminal sanction where they advertently break the law, such individuals can pursue their own interests in the knowledge that the law will only intervene if they have advertently invited the risk, thereby maximising freedom within the coercive framework of the law. As a rule-of-law standard therefore, the *mens rea* principle does not logically entail evaluating the particular type of conduct criminalised.

However, Ashworth and Zedner's inclusion of *mens rea* as a component of the principles restraining preventive offences violation of rule-of-law standards appears to envision a more extensive role than the purely formal one envisioned by Hart. For

Ashworth and Zedner, the *mens rea* principle and other rule-of-law requirements impose upon preventive offences so as to “clearly identify the wrong that that they penalise, for the purpose of guiding conduct and publicly evaluating the wrong done.”²⁷ Whilst this demand for clarity concerning the wrong done could be understood as merely greater certainty in defining the particular course of conduct criminalised, comments elsewhere suggest a more extensive role for the courts in exercising their interpretive powers is envisioned. For example, considering the risk that “the conduct specified by the legislation is not its real target but only a proxy for it, or identified as a likely precursor to it,”²⁸ the second principle relating to rule-of-law standards requires courts to “adjudicate on the particular wrong targeted, and not on some broader conduct.”²⁹ In ensuring preventive offences meet rule-of-law standards by clarifying the particular wrong targeted Ashworth and Zedner do not envision the courts merely defining conduct criminalised more precisely, but also assessing the connection between the conduct stipulated in the offence and the harm which criminalising that conduct aims to prevent. On the *mens rea* principle specifically and its role in ensuring law functions as an effective guide to conduct they state offences “should provide for the conviction only of persons who intend or knowingly risk the prohibited consequences.”³⁰ Again, ensuring preventive offences meet rule-of-law standards envisions the courts giving more precise definition to conduct criminalised, but also directing its attention to the harm criminalisation of conduct aims to prevent.

By envisioning the principles required to ensure preventive offences meet rule-of-law-standards as consisting in clarifying the particular wrong prohibited by an offence in the sense of assessing the relationship between conduct criminalised and the harm criminalisation aims to prevent, Ashworth and Zedner propose a more extensive role for such principles than is necessary to respect the individual as a moral agent in the sense that Hart understood. As we have seen, the sense in which Hart viewed the rule-of-law as respecting moral agency did not require evaluating the particular substance of an offence. The requirement that an individual have a fair opportunity to comply with the law spoke

²⁷ Ibid., 115.

²⁸ Ibid., 113.

²⁹ Ibid., 114.

³⁰ Ibid.

only to its formal rather than substantive quality. It is perfectly feasible to ensure preventive offences meet rule-of-law standards whilst remaining faithful to Hart's formal view by ensuring that an individual is only liable to conviction for such an offence where they have engaged in the conduct prohibited advertently, irrespective of their state of mind in relation to the harm which it is the aim of the offence to prevent. On Hart's view, such an offence would still respect the individual as a moral agent as they would still have a fair opportunity to pursue their interests within the law or go outside it and risk sanction. By widening the reach of rule-of-law standards into an evaluation of the relationship between conduct criminalised and the harm to be prevented, whatever Ashworth and Zedner may perceive to be the moral force of these principles, it cannot be seen to draw directly upon respect for the individual as moral agent in Hart's sense.

The principles identified by Ashworth and Zedner in relation to problems of remoteness and compliance with rule-of-law standards cannot therefore be seen to restrain preventive offences by direct appeal to the value of individual autonomy and respect for the individual as a moral agent. The principles relating to remoteness do not offer the individual an opportunity change their threatening conduct nor demonstrate that their conduct is non-threatening, whilst the principles relating to rule-of-law standards entail an evaluation of offences which goes beyond securing maximum freedom within the framework of law. If respect for the individual as a moral agent cannot be cited as the obvious source of the normative force behind these principles, the question arises as to what is. In order to answer this question it is important first to observe precisely how these principles restrain preventive offences and the role performed by *mens rea* requirements in this. Common to these principles is that they do not speak directly to the type of conduct criminalised in the sense of the stage at which it is located in the process of causing or risking a particular harm. Ashworth and Zedner instead appear to characterise this issue as one of justification and to be dealt with by the types of reasons and calculations specific to the legislative stage. However, the manner in which these principles do restrain preventive offences does direct itself to the relation between conduct and harm-to-be-prevented, but only in a very precise sense. The requirement of *mens rea* demands that the connection between the conduct specified and the harm-to-be-prevented be demonstrated before the court through the

medium of the place such conduct occupies in the plans of an individual who is demonstrably motivated by a disposition adverse to protected interests and thus poses some threat of harm. Principles invoking *mens rea* therefore restrain preventive offences by individualising those general calculations as to the dangerousness of certain types of conduct informing the creation of the offence.

If the restraining principles identified by Ashworth and Zedner derive their normative force from the manner in which they individualise general calculations as to the threat posed by types of conduct specified in preventive offences, the question remains as to whether such individualisation is motivated by protection of formal freedom against an overwhelming concern for security. If so, the challenge posed by Ramsay's argument has not been met as the restraining power of these principles would ultimately draw upon the value of individual autonomy which, according to Ramsay, can similarly be invoked to justify the use of preventive offences in securing autonomy. The answer to this question therefore lies in exploring precisely how these principles relate to the general justifications put forward for the creation of preventive offences. Ashworth and Zedner put forward satisfaction of the harm-principle as a necessary condition for justifying preventive offences, with the sufficient justification contingent upon "the costs and risks of criminalisation..., as well as the gravity of the harm to be prevented."³¹ However, the influence of the harm-principle extends beyond its role as a necessary condition insofar as other reasons put forward justifying criminalisation must not themselves fall foul of the harm-principle in relation to the security of prospective offenders. As Ashworth and Zedner note, "the concept of security can be employed on both sides of the debate: preventive offences may be justified by the increased security they bring to society generally, but they need to be restrained lest they reduce the security of certain individuals and groups within society."³² Questions concerning the 'costs and risks of criminalisation' as well as 'the gravity of the harm to be prevented' must ultimately be resolved in a manner respecting the essential interest individuals have in deciding for themselves what is in their own interest as explicitly morally substantive or utilitarian arguments would invoke reasons for coercively intervening

³¹ Ibid., 108.

³² Ibid., 109.

in the freedom of the individual for reasons other than the prevention of harm, and would thus risk falling foul of the harm-principle viewed from the perspective of the security of potential offenders.

The justification of preventive offences therefore ultimately hinges on striking the correct balance between the interests at stake in criminalising or not criminalising dangerous conduct. Moreover, the value of formal freedom lies at the very core of the balancing process by determining the weight attributed to the interests at stake. Whilst calls for criminalisation of certain types of conduct may be made on the basis that the harm threatened if realised would severely interfere with capacities essential to the exercise of formal freedom, criminalisation may itself be harmful as coercively removing the option of engaging in certain types of conduct where the danger it supposedly signifies would not be realised is also an interference with our capacity to exercise formal freedom. As Ashworth and Zedner appear to themselves acknowledge, this balancing process is rarely, if ever, uncontentious, and the harm-principle, even in conjunction with other considerations identified as impinging upon justification, “leaves many of the key questions about criminalisation open to political debate.”³³ This open-endedness has its source not only in the empirical uncertainty necessarily attending calculations of the likelihood that certain types of conduct will lead to particular consequences, but from the fact that judgments as to weight attributed to interests according to their importance for formal freedom will in perhaps all but the most extreme cases be a matter of controversy. At best, the balance struck by preventive offences can be seen as the product of an explicitly political evaluation of the interests at stake rather than the reasoned outcome of enlightened discourse concerning the value of freedom and the proper shape of our obligations to ensure its security, and at worst a compromise reached by a political process distorted by partisanship, self-interest, short-term pragmatism, and other reasons which may be considered morally arbitrary.

³³ Ibid., 104.

If preventive offences reflect a judgment on the harm threatened by criminalising or not criminalising conduct based upon an evaluation of the contribution the interests at stake make to formal freedom, how do the restraining principles identified by Ashworth and Zedner bear on this judgment? Do they challenge and readjust the balance between interests reached at the justificatory stage in favour of the defendant's formal freedom? It does not seem obvious that they do. As was noted above, the restraining principles do not directly touch upon the remoteness of the conduct criminalised from the harm-to-be-prevented. Rather, they demand that where remote conduct is criminalised it should be accompanied by higher-level fault requirements in relation to that harm. If the principles were directed at the remoteness of conduct, then the view that they attempt to adjust this balance would be feasible. Demanding that only conduct closer to the realisation of the threatened harm be criminalised would arguably reflect a judgment on the contribution to formal freedom of keeping the option of engaging in more remote conduct available as it would be offering greater opportunity to individuals to exercise formal freedom in favour of right reason – either by demonstrating innocent, non-threatening motives or changing their minds about future actions. If the relationship between remoteness of conduct and formal freedom is to be understood in this sense, then Ashworth and Zedner's restraining principles cannot be said to directly challenge the balance between competing demands of formal freedom reflected in particular preventive offences. If the restraints imposed by these principles were motivated by a defence of the defendant's formal freedom they would promote the value intrinsic to leaving the conduct concerned available as an option to individuals in exercising their formal freedom. But the possibility of taking such a view is denied by the silence of these principles on the remoteness of conduct itself. As such, they are better understood as respecting, or at least not directly interfering with, the political evaluation of the contribution the competing interests at stake make to formal freedom informing particular preventive offences.

Although the argument so far may demonstrate that the principles identified by Ashworth and Zedner do not directly impose upon the judgment concerning the contribution availability of options makes to formal freedom informing particular preventive offences, the question as to the source and nature of their normative appeal still remains

open. An adequate answer to this question can only be given by the type of detailed analysis of the doctrine of *mens rea* undertaken in the rest of this thesis, exploring its historical origins and subsequent development as part of the changing practice of English criminal law in response to transformations in its social and political environment. The immediate objective of this section is to defend this focus on the doctrine of *mens rea* against the challenge posed by Ramsay's argument outlined earlier, for which it is sufficient to merely to sketch the relationship between the principle of *mens rea* and the general justification for preventive offences evident in Ashworth and Zedner's analysis and the manner in which the normative considerations they give rise to arrive from different directions.

Two important features of these principles have been identified which combine to give a rough indication of the nature of their normative force. First, it was seen that invoking these principles individualises the general calculation as to the defendant's dangerousness lying behind the initial creation of the offence. Requiring the defendant be not only advertent to the nature of their conduct but also possess *mens rea* in relation to the specific harm targeted by the offence attaches to the judgment that the conduct concerned signifies a threat and demands the veracity of this general calculation be demonstrated before the court in relation to the particular defendant before it. A second feature of these principles was also highlighted in which they can be seen to *prima facie* respect and reinforce the balance struck between the competing demands of formal freedom established at the justificatory stage, rather than challenging it. In not imposing any restraints upon the remoteness of the conduct criminalised from the harm targeted by the offence, the principles say nothing about the value to individuals of such conduct remaining an available option in the exercise of their formal freedom. They instead respect the judgment at the justificatory stage that, *prima facie*, the threat posed to formal freedom by leaving such conduct outside the criminal law outweighs the threat posed to formal freedom by criminalising it.

These two features of the principles taken together present a very specific account of their restraining force. If preventive offences target dangerous individuals with the aim of preventing certain types of harm, then the principles identified by Ashworth and Zedner directly address the calculation employed to target such individuals in its empirical aspect only, rather than its normative or political dimension. Rather than challenging this calculation in the name of protecting the intrinsic value of the availability of the option of engaging in such conduct as a contribution to formal freedom, they refine it by testing its conclusions on the threat signified by certain types of conduct generally against the background of specific facts about the particular defendant presented before the court. This is not to say that the application of such principles does not have normatively or politically significant consequences. The need to prove *mens rea* in order to secure successful prosecution of course places a greater burden on policing and security agencies to collect evidence which may be difficult to obtain or impose a strain upon limited resources and thus potentially adversely affect their effectiveness in preventing harm. Nor is the account of the restraining principles identified by Ashworth and Zedner presented here one which these authors would necessarily subscribe to. We have already seen how they perceive the restraint imposed by the principles they identify to be motivated by respect for the individual as a moral agent and thus a defence of their formal freedom. What is argued here is that whether or not applying these principles may in practice protect the formal freedom of the defendant against the state's pursuit of public security, analysis of the substance of the principles themselves shows that these consequences cannot be seen as primary reasons supporting the normative force of the restraint they impose upon preventive offences. They should instead be seen as secondary consequences to their primary function of individualising the general calculation as to dangerousness behind the preventive offence, consequences which may nevertheless be put forward as considerations and their significance evaluated at the justificatory stage.

To return to the general aim of this section, the analysis presented above defends the decision to focus on the doctrine of *mens rea* against the implication of Ramsay's argument that such an approach would capture only a narrow aspect of the role of abstract thought about the person in criminal law. For Ramsay, doctrine represents an attempt to

justify criminal law by appeal to the notion that it respects formal freedom. This defence of formal freedom, however, is a one-sided interpretation of the more general value of individual autonomy which can equally be invoked to justify preventive offences in the name of 'real autonomy'. Traditional doctrine does not therefore enjoy a privileged status as a repository of abstract thought about the person in criminal law. Moreover, a complete picture of the role of abstract thought about the person can be accessed only by an appreciation of individual autonomy as an ideology specific to the material conditions of modern criminal law. The analysis of Ashworth and Zedner's restraining principles conducted in this section defends the focus on the doctrine of *mens rea* pursued in this thesis against the challenge posed to it by Ramsay's argument by bringing forward the possibility that the identification between doctrine and formal freedom upon which much of Ramsay's argument relies may not be as secure as assumed. As we have seen, it does not seem possible to view the principles identified by Ashworth and Zedner as restraining preventive offences in the name of defending formal freedom, but rather as individualising the empirical aspect of the calculation as to what types of conduct in general signify dangerousness informing the initial creation of the offence. Whilst this argument alone is nowhere near a sufficiently developed account of why these principles understood as such possess the normative force many claim they do, it does, I believe, suggest enough to establish the possibility, first that there is more to the origins and development of the doctrine of *mens rea* than the protection of formal freedom within criminal law and a one-sided expression of the value of individual autonomy, and second that the normative force behind the doctrine of *mens rea* draws upon an abstract conception of the person in a manner which cannot be resolved into other aspects of criminal law practice via the value of the individual autonomy, but which stands apart, if not necessarily opposed, to them. It is this conviction upon which the approach of this thesis is grounded. With the subject and approach of the thesis justified in light of current issues in criminal law theory, the chapter now moves on to presenting an overview and critical analysis of the prevailing literature on the origins of the abstract individual of modern criminal law.

3. The Nature of Modern Criminal Law

Individual Justice

In *Crime, Reason and History*, Alan Norrie locates the origins of modern criminal law's individualism in liberal moral and political philosophy emerging from the eighteenth century period of Enlightenment. In doing so, he places particular emphasis upon the retributive and deterrence philosophies of punishment which emerged from this period associated with the works of Immanuel Kant and G.W.F. Hegel, and Bentham and the legal reform movement he inspired respectively. Although the philosophical foundations of retributivist and deterrence theories were quite distinct, the former being grounded in the metaphysics of German idealism and the latter in the empiricism of utilitarianism, for Norrie both are united by the image of the person underlying them. Both placed a highly abstracted vision of the person at the core of their philosophies, emphasising an individual's capacity to direct their own behaviour through his or her ability to reason and calculate. Whilst retributivist philosophies argued that just punishment lies in the defendant having reciprocally denied his or her own right to freedom, emphasising the wilful element in conduct labelled criminal, deterrence philosophies thought that for punishment to be just it must contribute to the 'greater good' by being effective in reducing overall levels of crime, requiring that the defendant was advertent to their transgression and had the opportunity to abide by the law's prohibition. The emphasis upon the individual's abstract psychological capacities in the representation of individual behaviour was reflected in the marginalisation of considerations rooted in the wider social context in which such behaviour occurred. In Norrie's words, these philosophies were built around images of the person which were "abstractions from real people emphasising one side of human life – the ability to reason and calculate – at the expense of every social circumstance that actually brings individuals to reason and calculate in particular ways."³⁴

³⁴ Norrie, *Crime, Reason and History*, 21.

For Norrie, the impact of these philosophies on modern criminal law was two-fold. On the one hand, the manner in which they abstracted criminal conduct from the social environment led to the practical failure of the projects of legal reform they informed. The representation of crime as the product of free choices made by individuals entailed the promise of eliminating criminal conduct completely insofar as the law could be designed so as to manipulate this choice and make breaking the law an irrational option. However, abstracting the choice to commit crime from the particular context in which those choices are made systematically obscured the reality of crime. For Norrie, the origins of crime lie ultimately in concrete social and economic conditions, and in particular in the prevalence significant inequalities existing therein. Although the use of such abstractions to represent crime promised a neat and logically consistent theory, and subsequently suggested legal reform projects to reduce it, they were ultimately “inadequate either to comprehend or control the reality of crime,”³⁵ and eventually “doomed it to inefficacy.”³⁶

Whilst the marginalising of considerations rooted in the social environment within these theories of punishment may have rendered them ineffective at understanding and explaining crime, and led eventually to their practical failure, the abstract vision of the person at their core nevertheless enjoyed a more permanent legacy in modern criminal law. The manner in which these theories placed the figure of the abstract individual at their core presented a new common basis for imagining what the proper ends of criminal law should be. Norrie argues that these philosophies of punishment gave rise to the liberal moral and political ideology informing the individualist form of modern criminal law. He identifies how placing the abstract individual as the central figure of legal philosophy enabled a transformation in the perceived normative foundations of criminal law itself. The abstraction of the person and its isolation from its social environment enabled criminal law to be presented though a “rhetoric of individual liberty which transcends particular social interests.”³⁷ Where the individual in isolation from their social environment is considered the proper end of criminal law, new demands are imposed upon its practice if they are to be

³⁵ Ibid., 22.

³⁶ Ibid., 23.

³⁷ Ibid.

perceived as legitimate. In particular, with the formal exclusion of differences located in the social environment as a basis upon which to legitimise the application of punishment, practice must respect the individual *qua* individual by recognising their formal equality with others, as well as their right to only have their freedom taken away if they can be seen to in some sense have willed it. The figure of the abstract individual as the end of modern criminal law was therefore reflected in the universal character of the concepts rationalising and legitimising its practices, specifically constructed in order to present criminal law as addressing all persons equally and operating independently of the diversity and differentiation to be found in its social environment.

Whilst the abstract and universal character of modern criminal law does not immediately lend itself to historical contextualisation, by tracing the origins of its abstract individualism Norrie seeks to uncover its particular historical character and use this to explain certain aspects of its contemporary practice. Norrie's method of historicising modern criminal law primarily entails uncovering its material basis, illustrating how its constituent concepts operate in practice to protect a certain type of order securing the social and economic interests of a dominant class. Along these lines, Norrie directly locates the origins of modern criminal law's abstract individualism in the growth of industrial capitalism and the consolidation of relations based upon private property throughout English society at the turn of the nineteenth century. These socio-economic transformations impacted upon criminal law in two ways. First, "[a] new social class was coming to the fore, ready to replace the old élite and its particular logic of rule with a new one."³⁸ Accompanying these socio-economic transformations was a shift in power towards a new class of capitalists, challenging the traditional system of political authority founded upon a neo-feudal structure of personal obligations and customary social hierarchies. This new class sought to employ the coercive and ideological power of the law to secure and propagate the particular type of social order organised around private property and market transactions upon which their power depended.

³⁸ Ibid., 16–17.

Second, following directly from the political struggle over control of the legal apparatus was the entrance of a new range of socio-economic interests shaping the practice of criminal law itself. Criminal law thus faced the practical challenge of how to protect these interests. As relations based upon the ownership and exchange of land, goods or labour became an increasingly central feature of social life, and as those relations themselves grew in complexity and uncertainty with the transformation of the social environment by industrialisation and urbanisation, the property relation itself and the rights it gave rise to came to be seen in increasingly abstract terms as it was isolated from the customary sources of obligation within which it was traditionally enmeshed. In particular, there were “new forms of property and wealth that were produced in the periods of mercantile and then industrial capitalism” which needed legal protection.³⁹ The system of rights based upon custom and tradition which had previously governed the usage of land when England’s social and economic base was primarily agrarian had to make way for a system of clearly defined, positive rights which protected property owners’ exclusive use of their land, and was more amenable to capitalist methods of farming as a result. In towns and cities the increase in the prominence of movable goods and commodities which were vulnerable to theft, and the location of vast wealth close to poverty and deprivation, similarly necessitated a clear definition of property rights and their effective enforcement.⁴⁰

For Norrie, these material conditions attending the consolidation of industrial and commercial capitalism in English society during this period explain the emergence of the Benthamite utilitarian legal reform movement mentioned above. The reform movement grew in response to these conditions insofar as its aim was to increase law’s effectiveness in securing the rights and interests vital to maintaining the newly emerging social order against the background of the perceived ineffectiveness of the traditional legal order at actually deterring criminal behaviour. Built around a collection of draconian laws imposing the death penalty for relatively minor offences, especially in relation to property, whilst simultaneously making frequent use of the judicial facility to request royal pardons to enable those convicted to escape punishment, the ‘Bloody Code’ combined violence and

³⁹ Ibid., 20.

⁴⁰ See E. P Thompson, *Whigs and Hunters: The Origin of the Black Act*, 2013.

mercy in order to terrorise the population into obedience.⁴¹ Whilst the ideology of personal bonds and obligations was powerful enough to modify and correct behaviour in relation to property, and invest the law's acts of violence and mercy with necessary symbolic power, the system may have been perceived as adequate to its purpose. However, as the material foundations of this ideology broke down under the pressure of market relations loosening traditional customary ties, and conflict over property rights became a more pervasive feature of society, the limitations of the traditional legal order became more apparent, coming to resemble more closely mere arbitrary exercises of force rather than expressions of magisterial authority.

This arbitrary quality of the traditional legal order was blamed for what was perceived as widespread criminality. Discretionary practices found throughout the system, enabling judge or jury to save the accused from execution and mitigating the harshness of the formal law, meant that breaking the law did not necessarily mean being subject to the harsh punishments prescribed by it. Individuals could infringe others' rights knowing they stood a good chance of escaping punishment, which for a large proportion of the population afflicted by poverty was a chance worth taking, rendering the enjoyment of property rights relatively insecure. The legal reform movement responded to the perceived vices of these discretionary practices and the mystifications through which their use was justified by emphasising the value of certainty and publicity throughout the criminal law. Armed with clear definitions of offences, and the knowledge that breaching them will almost certainly incur punishment, subjects clearly understood where they stood vis-à-vis the law and, in principle, could calculate that it would be against their interests and hence irrational to break it.

Norrie's uncovering of the historical origins of the abstract individual in legal thought informs his more general claim about the ideological character of modern criminal law. In linking the reform movement with the emergence of industrial and commercial capitalism,

⁴¹ Douglas Hay, "Property, Authority and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, ed. Peter Linebaugh et al. (London: Verso, 2011).

Norrie employs historical analysis to uncover the social and economic substance underlying the abstract individual, identifying its material basis in a particular type of social order in which the coercive apparatus of the law is required to enforce property rights. the gap between the formal and universal character of the abstract individual and its material basis in a particular social and economic order where Norrie sees the ideological character of modern criminal law, which he labels its 'repressive individualism'. On the one hand, by making the abstract individual the core of its theory and practice, modern criminal law can claim to be 'standing up' for the individual against demands that an ever-wider scope of conduct be criminalised on the grounds of public policy or community values. As such modern criminal law can make the claim to legitimacy on the basis that it recognises and respects the inherent moral worth of the individual, regardless of the particular status or identity of the person before it.

On the other hand, the ideological character of modern criminal law "lies in its ability to mask the onesidedness of its instrumental content through its formal character as a logic of universal individualism."⁴² The individualist discourse of modern criminal law obscures the context within which criminal conduct takes place by representing it in abstract terms as the product of freely chosen behaviour directed towards the infringement of another's rights. Consequentially, matters such as the substance of the interest infringed or the particular social or economic status of the accused are presented as marginal to establishing what criminality is when it has occurred. Deeper and more searching investigations into the nature of criminality as a social phenomenon which may call into question the particular social and economic ends towards which modern criminal law is aimed are systematically excluded from legal discourse structured around principles of individualism. Modern criminal law therefore uses the claim that it defends the interests of all as individuals to legitimise its role in protecting the interests of some at the expense of others. It would "protect, bind, and secure prompt obedience from all, yet some would have more to be protected while others would feel its bind the more pressing."⁴³

⁴² Norrie, *Crime, Reason and History*, 23.

⁴³ *Ibid.*, 24.

Norrie goes on to illustrate how the ideological function of modern criminal law can be seen to operate in its actual practice. Norrie claims that only if one appreciates this ideological function can we begin to understand why the promise of uncovering the general rationality and coherence of modern criminal law informing the works of so many theorists and practitioners is constantly undermined by the seemingly unruly reality of its practice. For Norrie, the reason such promises fail to be realised, and can never be fully realised, lies in the 'gap' between the form and substance of modern criminal law. Whilst its individualist form promises the possibility of developing general principles and concepts applicable across the criminal law, the fact that in its substance it protects particular interests over which there may be significant conflict as to their moral and political value, inescapably informs its actual practice. Attempts to develop rational and coherent accounts of modern criminal law are therefore constantly undermined by certain parts of its practice where outcomes are dictated by considerations arising from the substantive implications of the decision, even if these considerations are not formally acknowledged.

Norrie develops this argument through a critique of the concept of individual responsibility operating in modern criminal law, in particular the core *mens rea* doctrines of intention and recklessness which he argues are marked by inescapable tensions and contradictions that can only be understood and explained by appreciating the ideological function of modern criminal law. These tensions are understood to be located in the conflict between two approaches to the concept of individual responsibility underlying these doctrines. On the one hand, the 'orthodox subjectivist' approach, which Norrie identifies as the dominant approach in doctrine and practice, demands that in order to be held responsible for conduct a clear link must be established between the defendant's state of mind and the particular harm which he or she is deemed to have caused. As a result, when determining the content of concepts such as intention and recklessness emphasis is placed upon reducing them to 'factual' psychological states of mind in connection to the protected interest which can be clearly and positively proven in court. On the other hand, opposed to the orthodox subjectivist approach is that which Norrie labels 'moral

substantivism'. This approach rejects the orthodox subjectivist reduction of concepts of responsibility to psychological states of mind, insisting that the sharp distinction it draws between the mental element and the harm caused fails to capture the nature of responsibility as a moral judgment. This is especially the case in the context of criminal law where judgments may be invested with importance not only because of the defendant's rights which are at stake, but also because of whatever symbolic or expressive function such judgments may perform in relation to the community in general. Intention and recklessness therefore operate in criminal law as moral concepts, and as such demand an evaluation of aspects of conduct which may fail to be captured by focussing narrowly on abstract states of mind, such as the defendant's wider motive or the character manifested by his or her acts.

Norrie explains difficulties confronted in developing coherent doctrines of intention and recklessness as the consequence of conflict between the orthodox subjectivist and moral substantivist approaches. With regards to intention, the contrast between the sharp distinction maintained in doctrine between motive and intent and its continuous undermining in practice, as well as inconsistent expressions in the law and in directions to the jury of the degree of certainty or probability required for a state of mind to come within oblique intention (as opposed to mere recklessness), are interpreted by Norrie as the result of attempts in some judgements to try and capture substantive moral considerations in play in the case before them. Where the reduction of intention to an abstract, psychological state of mind insisted upon by orthodox subjectivists may be perceived as failing to capture these considerations, the less restrictive approach of moral substantivists allows the court to be guided more by what it is felt the defendant 'deserves'. The presence in criminal law of incompatible subjective and objective tests for establishing recklessness, as well as the apparent emergence between them of an approach based upon 'practical indifference', are also interpreted in the same terms of a conflict between orthodox subjectivist and moral substantivist approaches. Whilst the orthodox subjectivist approach insists that recklessness properly lies in an advertent state of mind in relation to the risk undertaken, where the harm caused is sufficiently serious, or the attitude expressed towards the victim's interests is sufficiently immoral, the compulsion arises to hold the defendant responsible even if he or she was not strictly speaking advertent to the risk of harm. Again, in such

circumstances the moral substantivist's insistence that responsibility cannot be determined in isolation of substantive considerations arising from the nature of the harm caused or other circumstances gains strength as it gives the courts authority to widen the concept of recklessness beyond advertent states of mind. The doctrines of intention and recklessness are therefore marked by tensions and contradictions as the orthodox subjectivist and moral substantivist approaches give rise to decisions underpinned by fundamentally opposed notions of the nature of responsibility as a moral and legal judgment, and which cannot therefore be reconciled on any abstract level, blocking the development of general principles giving coherence to the body of law as a whole.

An important component of Norrie's argument is that these contradictions are not the result of a mere failure on behalf of judges to appreciate what the principles of individual responsibility demand in particular cases and apply them consistently in practice, but are instead the necessary consequence of modern criminal law's historical character as a form of social control in a capitalist social order. Whilst in practice the inability of the orthodox subjectivist approach to capture moral considerations presenting themselves in judgments of criminal responsibility may frequently be exposed, it is an essential part of criminal law's ideological function of 'masking' the fact that it protects particular social interests over which there may be significant moral and political conflict, and so cannot be abandoned. By reducing criminal responsibility to a matter of proving factual states of mind, and therefore avoiding the need to engage in a moral evaluation of the defendant's conduct, the orthodox subjectivist approach excludes the introduction of substantive considerations into the courtroom which may expose the fact of significant conflict over the moral and political value of the interests which the law protects. In relation to the origins of separation of motive from intent, Norrie argues it was part of the "squashing of alternative definitions of right and wrong" in the criminal law as the ruling classes "sought a universal definition of right and wrong that could legitimate extremely dubious processes of property expropriation of the poor by the rich."⁴⁴ Similarly, the orthodox subjectivist emphasis upon advertence in recklessness was "a means of positivising, de-moralising and thereby

⁴⁴ Ibid., 38.

rendering certain” the law, growing out of a rejection of the traditional doctrine of implied malice which was comprised of “vague moralisms” which “leaves the content of the law at large in the community.”⁴⁵

The fact that the criminal law protects particular interests, the value of which may be contested, continuously imposes itself upon the practice of criminal law, challenging the ideological purpose of orthodox subjectivist doctrines of individual responsibility to exclude substantive considerations from the courtroom, and preventing its smooth implementation across the criminal law as a whole. The most obvious testament to this constant pressure imposing itself upon the criminal law is the presence of offences which eschew any subjective element at all due to the seriousness of the offence, such as gross negligence manslaughter. Moreover, the idea that orthodox subjectivism’s dominance is in constant tension with a more morally substantive approach is evidenced in the articulation of the latter’s concerns in the language of the former, as in for example the attempt to give the courts moral leeway in the law on oblique intention by lessening the certainty requirement rather than explicitly acknowledging the moral nature of the motives reshaping the boundaries. Modern criminal law is therefore “caught in a necessary, structural dynamic of excluding and re-admitting substantive moral issues into a technically conceived set of fault categories.”⁴⁶

Public Order

Despite the undoubted power of Norrie’s critical analysis, doubts have been raised as to the view presented of the historical development of modern criminal law upon which it is built. In particular, it has been suggested that his ambition to critique the individualist form of criminal law doctrine as ideology leads him focus too narrowly on modern criminal law’s claim to do individual justice. In doing so Norrie arguably risks overlooking other

⁴⁵ Ibid., 77.

⁴⁶ Ibid., 58.

important dynamics in the historical development of modern criminal law which are not only important to uncover for their own sake from the perspective of historical inquiry, but may also have implications for his analysis of the individualist form of criminal law doctrine.

These themes are taken up by Lindsay Farmer in *Criminal Law, Tradition and Legal Order*, an important contribution to the historical study of criminal law both for the detail of historical analysis and the argument concerning the nature of modern criminal law developed through it.⁴⁷ Focussing on Scottish criminal law, though making frequent comparisons to developments in England, Farmer traces how from the late eighteenth century and throughout the nineteenth century the practice and jurisdiction of criminal law was transformed.⁴⁸ The method adopted by Farmer in constructing his historical argument is to analyse criminal law and the criminal justice system primarily from the perspective of its role in the task of governance, with the changes witnessed in its practice interpreted as the shift from one model of governance through criminal law to another. In particular, Farmer argues that during this period the task of securing and legitimising political order became a less prominent objective for the criminal law as it increasingly became identified instead with the maintaining public order.

To each of these models corresponded a different set of practices and goals operating throughout the criminal law. In the order prevailing at the end of the eighteenth century criminal law was “the means of the expression and protection of a range of concerns that reflected the political and social interests of the elite”,⁴⁹ with the overarching task of combatting significant social and political instability in order to “instil a respect for the sources of the law and the authority of its officers.”⁵⁰ Farmer illustrates how the content of the law itself as well the practices through which the law was actually enforced

⁴⁷ Farmer, *Criminal Law, Tradition, and Legal Order*.

⁴⁸ Although Norrie claims that, at least in relation to the development of homicide, Farmer is inconsistent in his claims as to when in the nineteenth century modern criminal law can properly be said to have developed: see Alan W Norrie, *Punishment, Responsibility, and Justice: A Relational Critique* (Oxford; New York: Oxford University Press, 2000), 54–55.

⁴⁹ Farmer, *Criminal Law, Tradition, and Legal Order*, 103.

⁵⁰ *Ibid.*, 108.

was underpinned by the need to both reinforce the legitimacy of the political order by enshrining its rights, privileges and duties and attributing to its imagined hierarchies the formal dignity of law, whilst confronting also the practical problem of efficiently suppressing actual and potential threats to that order.⁵¹ When moving into the nineteenth century the development of criminal law is marked for Farmer by the increasing differentiation of the legal order from the political order, and its replacement with a concern for maintaining public order. One of the most significant indications of this development was an expansion of the jurisdiction of the criminal law in terms of the range of social activities coming within its reach. For example, types of minor delinquencies which were of no obvious significance to the political order, either in terms of being a symbolic threat to its legitimating values or an actual challenge to its sources of authority, came to comprise a major component of the cases coming before the courts as criminal law became an instrument in the task of policing low-level public nuisances such as vagrancy, drunkenness and prostitution. As such the association between crime and threats to political order was weakened as criminal law increasingly directed itself towards “the ordering of public behaviour”⁵² and matters of “order and respectability”.⁵³

Another important aspect of the transformation undergone by criminal law during this period was the entrance of new objectives into its practices directed towards protecting social interests, yet which was not reducible to the idea of community values or private property with which criminal law had always been associated. Farmer illustrates how this new interest revealed itself in how the charge of breach of the peace was used, criminalising not only particular acts with which a specific disturbance to a member of the public could be identified, but also conduct which could potentially cause such a disturbance, detaching criminality from specific, identifiable harms to subjects and locating it instead in an indeterminate vision of order articulated in the name of the public, but defined in practice by the police officer, judges and other officials responsible for its prosecution.⁵⁴

⁵¹ Ibid., 102–109.

⁵² Ibid., 109.

⁵³ Ibid., 111.

⁵⁴ Ibid., 113–114.

The expansion of the regulatory function of criminal law represents another example of the entrance of social interests into criminal law, aimed at areas of social life involving inherently dangerous activities accompanied by a high degree of risk, such as manufacturing or transportation, or concerned with maintaining public order, such as the licensing of public houses and other establishments associated with immoral or disorderly behaviour. The expansion of this regulatory function of the criminal justice system was facilitated by transformations in the substance of the law and its administration. In relation to its substance, the number of statutory offences proliferated, creating legal regimes aimed at identifying social actors to be criminalised for the actual or potentially harmful consequences of dangerous activities, often employing strict or absolute standards of liability in doing so. In this regulatory function the criminal law was effectively being used as an instrument to distribute the social burden for reducing the risks involved in these dangerous activities, with strict and absolute standards of liability employed in order to ensure it distributed this burden effectively and efficiently by ensuring individuals were criminalised for the outcome deemed to have been caused by their conduct rather than whether they could be said to be culpable or at fault for it. This area of modern criminal law did not appear to punish 'wrongful' acts against right or suppress threats to the political order, but was an example of criminal law being used as an instrument to realise social goals and implement policies.⁵⁵

Perhaps the most pertinent aspect of Farmer's historical analysis for Norrie's argument is bringing into view the prevalence of a concept of responsibility operating in criminal legal practices based upon the character manifested in the defendant's conduct rather than their psychological state of mind. With the expansion of criminal law over new areas of social activity increasing the workload of the courts and placing pressure on them to quickly and efficiently produce guilty verdicts, combined with a change in the substance of the work undertaken by the courts as the focus of the criminal law on administering and managing public order became increasingly detailed, courts became increasingly dependent

⁵⁵ Ibid., 122–126.

upon evidence provided by policing and other bureaucratic agencies both as to the character of the offender and the circumstances surrounding the alleged offence.⁵⁶ Judgment and punishment by the courts became a “function of administrative procedure” rather than a detailed enquiry into the conditions in which it is fair to hold a person responsible for their conduct, if indeed it ever was.⁵⁷ The picture painted by Farmer is one where criminality has increasingly become separated from the idea of moral wrongdoing or blameworthiness, and where adjudication is as much dominated by the policing and management of the population as it is by questions of right and wrong. Whatever connection to protecting values and moral order legal discourse may have traditionally had, and however grounded in individual justice it was or presents itself to be, it was transformed by criminal law’s instrumentalisation by the modern bureaucratic state, where “legal guilt and legal status were blurred” as were “the boundaries between guilt and character”,⁵⁸ and where “[g]uilt, punishment and harm are both legal and administrative categories.”⁵⁹

The general picture presented by Farmer is that as criminal law’s social environment became less politically charged, this was reflected in its practices as its goal shifted from defending order to maintaining it. Problems of legitimacy and authority associated with political order which were previously at the heart of criminal law were replaced by more technical and managerial objectives concerning the control of public space, and in which the criminal law itself became an instrument in “the construction of a positive vision of social order.”⁶⁰ By highlighting the extent to which criminal law throughout the nineteenth became increasingly dominated by new types of social interests, Farmer indicates possible limitations in Norrie’s view of modern criminal law outlined in the previous section. In particular it suggests that insofar as individual justice was an objective of some criminal legal practices, it must be considered in the context of a criminal justice system that, empirically speaking at least, chiefly operated as an instrument for maintaining public order. On

⁵⁶ Ibid., 113–117.

⁵⁷ Ibid., 121–122.

⁵⁸ Ibid., 121.

⁵⁹ Ibid., 128.

⁶⁰ Ibid., 117.

Farmer's view criminal legal practices from the nineteenth century onwards were as much instruments for the realisation of social goals and implementation of policies decided upon by agencies and institutions outside the courts as they were forums for the adjudication of right and wrong and securing of individual justice, whether ideological or not. Moreover, Farmer's argument highlights the prevalence in criminal legal practices of a concept of responsibility based upon character rather than capacity, in which the abstract perception of the individual Norrie argues is invoked to ideologically legitimise criminal legal practices plays no significant part. Whilst none of these aspects of Farmer's historical analysis by themselves necessarily directly challenge Norrie's critique, they do pose the possibility of a multiplicity of practices for attributing responsibility operating throughout modern criminal law which the latter does not appear to capture. Moreover, as the doctrine towards which Norrie directs most of his analytical and critical energies covers only a small, relatively narrow part of the practice of modern criminal law, the question emerges as to the nature of the relationship between this area and those practices which fall outside it.

Citizenship

In *The Responsible Subject as Citizen*, Peter Ramsay considers some of the implications of Farmer's argument outlined in the previous section for Norrie's focus on individual justice and legitimacy as central concerns in modern criminal law.⁶¹ Ramsay's argument largely defends the view of modern criminal law presented by Norrie in *Crime, Reason and History* by attempting to incorporate into it those features of its practice which Farmer associates with the overarching objective of public order as opposed to individual justice. Ramsay identifies two features of the historical development of modern criminal law that potentially present a problem for Norrie's approach, and which must be accounted for if the focus on liberal principles of individual freedom and formal equality is to be justified. First is the expansion of the regulatory function of criminal law during the nineteenth and twentieth centuries, already outlined in relation to Farmer's argument

⁶¹ Peter Ramsay, "The Responsible Subject As Citizen: Criminal Law, Democracy And The Welfare State," *The Modern Law Review* 69, no. 1 (2006): 29–58.

above. The prevalence of strict and absolute standards of liability in this area of the criminal law *prima facie* challenges Norrie's assertion that criminal legal practices were dominated by a concern with individual justice, albeit ideological, by seemingly prioritising the implementation of policy underlying the law. The second feature of the historical development of modern criminal law identified by Ramsay as potentially disrupting his and Norrie's argument is the relatively late emergence of subjectivism as the orthodox approach in doctrinal analysis and criminal law theory. Whilst Norrie traces the origin of the moral and political principles informing the concepts of responsibility advocated by the orthodox subjectivist approach back to philosophical themes developed in the Enlightenment of the eighteenth century, it arguably did not consolidate its position as orthodoxy in theory and doctrine until the mid-twentieth century, signified by the publication of Glanville Williams' *Criminal Law: The General Part*,⁶² where the unity of the criminal law was presented as being located in the general applicability of the core *mens rea* doctrines of intention and recklessness.

Both of these features in the historical development of modern criminal law potentially undermine Norrie's argument by questioning the position from which he begins his critique - that criminal legal practices claim legitimacy according to a concept of individual justice. The expansion of the regulatory function of criminal law, and the employment of strict and absolute standards of liability therein, brings forward the effective implementation of policy as a key objective of criminal legal practices. This in turn calls into question the assumption that criminal legal practices were concerned with the adjudication of right and wrong according to principles of individual justice, or at least calls for consideration of how this objective interacts with other more social, policy-driven objectives. The late consolidation of orthodox subjectivism could be seen as a symptom of the fact that rationalities other than individual justice openly operate throughout the criminal law, suggesting that how individual justice came to impose itself as a normative concern for criminal legal practices may be more complicated than is accounted for by the picture of the historical development of modern criminal law presented by Norrie in

⁶² Williams, *Criminal Law: The General Part*.

drawing a line from the Enlightenment and the law reform movement up until the present day.

Ramsay rebuts the suggestion that these features of the historical development of modern criminal law highlight potential problems for the focus on individual justice in Norrie's argument by exploring in greater detail how claims for the legitimacy of modern criminal law are made, in order eventually to see how the regulatory function of criminal law operates as part of those claims. Whilst he accepts that the orthodox subjectivist approach in criminal law doctrine focuses on a narrow area of criminal law, often excluding those regulatory offences employing strict or absolute standards of liability and as a result ignoring the interface between the retributive and regulatory functions of modern criminal law more generally, he suggests that Farmer also ignores this interface by making the former a function of the latter, collapsing the two into each other rather than exploring their interaction.

Ramsay argues that by acknowledging how ideas about citizenship operate as an important factor in the wider political environment of modern criminal law, both its retributive and regulatory functions, and the *prima facie* opposed standards of liability associated with each, can be seen as necessary aspects of modern criminal law's claims to legitimacy.⁶³ Ramsay maps these seemingly antithetical practices in modern criminal law onto the tripartite division between civil, political and social rights developed by T.H. Marshall in his political sociology of citizenship in the mid-twentieth century democratic welfare state. In doing so, he places particular emphasis upon how the struggle for universalisation of political rights throughout the nineteenth and early twentieth century, culminating in securing universal suffrage in 1928, transformed the demands placed upon the criminal law to secure civil and social rights as conditions for the enjoyment of democratic citizenship. As voting qualifications based on gender or property ownership were abolished, the state itself ceased to be associated with any particular social identity or status, but was instead tasked with pursuing the universal interests of the political

⁶³ Ramsay, "The Responsible Subject As Citizen," 31–36.

community. Importantly, with the abolition of substantive differentiation in the concept of the democratic state, individuals come to be seen to relate to each other as abstract and formally equal citizens, which the use of coercive force of the state, such as the punishing of crime, must recognise if it is to be justified and legitimate.

Ramsay associates the consolidation of subjectivism as the orthodox approach in criminal law doctrine and theory with the impact of democratisation on the civil aspect of citizenship. Democratisation meant that, insofar as criminal law was instrumental to securing subjects' civil rights, it had to do so in a manner which respected the vision of formal equality underlying the normative force of such rights. Ramsay appears to identify the demand for formal equality underlying the enjoyment of civil rights in a democratic society as key to the emergence of orthodox subjectivism in two senses. On the one hand, democratisation undermined the legitimacy of traditional practices for attributing responsibility according to the 'wickedness' or 'malice' expressed in the defendant's conduct. Prior to the abolition of voting criteria formally excluding groups of people from the political community based upon class and gender, the political community was associated with a 'thick' substantive view of a hierarchical social and moral order based upon property and personal relations. As such the state was perceived to formally embody particular interests and values expressed in civil rights, which were subsequently reflected in the substance and administration of the criminal law. The question of responsibility was therefore guided by whether the defendant's conduct breached a duty or obligation to uphold the values important to the community and enshrined in the criminal law. As such this evaluation was more moral and contextual in nature, underpinned by a vision of criminal law as protecting particular substantive values, rather than the factual and abstract nature of inquiries into the defendant's state of mind entailed by modern concepts of individual responsibility. The consolidation of democracy formally abolished particular interests and values from the concept of the state, with the result that protecting particular values in practice would be regarded as a breach of the formal equality between individual citizens. Consequentially the legitimacy of the traditional practice for establishing responsibility was undermined, guided as it was by the vision of criminal law as enshrining particular substantive values.

Corresponding with the challenge posed by democratisation to the legitimacy of traditional practices was a push for the generalisation of the orthodox approach to individual responsibility in those offences concerning civil rights. As democratisation transformed the normative basis of civil rights from that of protecting particular substantive values to guaranteeing formal equality and participation within the political community, the basis for attributing liability and applying punishment for their infringement also changed. In particular, punishing infringements of civil rights needed to respect the demand for formal equality arising from the defendant's status as a citizen and which gives such rights meaning. For Ramsay this means that for punishment to be legitimate a defendant must "deny to her victim the equal status of civil citizenship as such and, thereby, reciprocally deny her own status."⁶⁴ Ramsay understands this denial as taking the form of conduct expressing disrespect for the freedom of choice which civil rights aim to secure. As such, not only must the defendant's conduct infringe a right which in its substance is concerned with freedom of choice, but in order to amount to disrespect "the commission of one of these offences *must* be wilful." For Ramsay, therefore, the undermining of traditional approaches to responsibility based upon criminal law's protection of substantive values, combined with the demand that punishment only be imposed upon those who have denied their own status as citizen by wilfully denying it to another, means that in a democratic political community "the responsible subject is a logically inescapable and necessary figure for doctrine".⁶⁵

Whilst Ramsay locates the origins of the responsible subject of criminal law doctrine in the consequences of democratisation on citizenship in its civil aspect, the expansion of the regulatory function of criminal law, and the standards of strict and absolute liability employed therein, is associated with what T.H. Marshall identified as the social aspect of citizenship. Claims to social rights are addressed to "limitations on the practical impact of civil and political citizenship for the majority of citizens."⁶⁶ Social rights arise out of

⁶⁴ Ibid., 45.

⁶⁵ Ibid., 46.

⁶⁶ Ibid., 48.

recognition that, whilst civil rights may be underpinned by the demand for formal equality in the democratic political community, the concrete conditions in which individuals find themselves dictates that the opportunity to exercise and enjoy these rights differ significantly throughout the community. The existence of socio-economic differences in society, as well as existence of prejudicial attitudes towards certain groups, entrenched unequal access to resources considered vital to the development of individual capacities and enjoyment of formal freedom promised by civil rights. The demand for social rights therefore involved reflection upon what gave civil rights value in terms of their actual exercise or enjoyment, leading to scrutiny of the restrictions imposed by the concrete conditions in which individuals actually found themselves. The demand for equality underpinning social rights was of a substantive rather than formal quality. Social rights are aimed at securing the minimum conditions identified by the democratic political community as being necessary in order to lead a 'civilised life' within that community. The regulatory function of criminal law spoke to this social aspect of citizenship insofar as it acted as an instrument for creating an environment in which each individual's equal status as a citizen can be said to be respected. The use of strict and absolute standards of liability in regulatory offences can correspondingly be understood as an essential technique for effectively distributing the burden of reducing the risks onto those identified as best placed to bear it. Whereas citizenship in its civil aspect may demand that punishment must vindicate the defendant's formal equality with others and not leave him or her at the mercy of the community's moral judgment, in its social aspect emphasis is placed upon the actual or potential infringement of a social right, and so "allows that an individual may be treated by the law as a means to a democratically agreed end".⁶⁷

In identifying the retributive and regulatory functions of modern criminal law with the civil and social aspects of democratic citizenship, Ramsay responds to the claims outlined above that focus on how criminal law claims legitimacy by securing individual justice distorts the historical development of criminal law. Whilst the regulatory function of criminal law can be seen as demanded by the social aspect of democratic citizenship, the

⁶⁷ Ibid., 50.

late development of orthodox subjectivism is explained by the fact that social differences were not abolished from the concept of the state until the franchise was extended to all in the mid-twentieth century. However, Ramsay's argument goes further in order to uncover the ideological character of this method of rationalising criminal law. As with Norrie, the ideological critique is important to Ramsay's overall argument as it locates orthodox criminal law theory and doctrinal analysis within a specific historical experience by uncovering the particular concrete interests it protects but its abstract form does not acknowledge. This aspect of Ramsay's argument is illustrated through a critique of Brudner's attempts to put the interface between these two functions of criminal law and their corresponding forms of liability on a rational footing. Brudner argues that these two apparently antithetical aspects of the criminal law can both be legitimised according to paradigms of agency and welfare within what he calls the 'dialogical community'. The value of formal agency presumes the consideration of how it is actually exercised and the ends towards it is put, whilst those ends only have value insofar as they can be considered to be self-authored by formally free individuals. For Brudner, by acknowledging the interdependence of agency and welfare we can see that the retributive and regulatory aspects of criminal law and their corresponding forms of liability should not be seen as in conflict or competition with one another, but as two essential elements in its realisation of a legitimate whole. Moreover, there is sufficient tension between the two paradigms for each to keep the other in check and ensure that one side does not come to dominate criminal law. Given that the normative force of each paradigm is dependent upon the realisation of its opposite, in the situation of one paradigm disproportionately dominating criminal law at the expense of the other, the normative foundation of the system as a whole would be brought into self-contradiction and subsequently fail in its claims to legitimacy.

For Ramsay's purposes, the importance of Brudner's argument lies in his claim that whilst the force of each paradigm may be contingent upon the realisation of its opposite, they are sufficiently differentiated so that taken together they suggest particular normatively valid solutions to concrete problems, and as such each enjoys its own sphere of application within the criminal law. Ramsay argues that this claim that the legitimate scope of the retributive and regulatory functions of modern criminal law is logically deducible is a

manifestation of its ideological character. In doing so, Ramsay draws parallels between Brudner's paradigms of agency and welfare and Marshall's concept of citizenship in its civil and social aspect, positing the latter against the former. Whereas Brudner's concept of the dialogic community is philosophical in nature and claims to give an abstract foundation to criminal law's claims for legitimacy in a manner transcending the specific features of time and space, Marshall's concept of citizenship is historical insofar as it seeks to present the relation between civil and social rights as the product of a particular political settlement identified with the democratic welfare state.

For Ramsay, this difference between Brudner and Marshall has important consequences for understanding the interface between the retributive and regulatory aspects of criminal law. From the perspective of Marshall's concept of citizenship the interface is characterised as established by a settlement arising from the "compromise of the political conflict between different concrete social interests in the nineteenth and twentieth centuries."⁶⁸ As a result the scope and content of civil and social rights in relation to one another is marked by a degree of indeterminacy, and where the line is drawn between them is contingent upon historically specific agreement. Moreover, pressure is constantly exerted on the precise content of this agreement from political conflicts originating in inequalities existing in society. For Ramsay, reflection on the actual historical experience of democratic political communities testifies to the essential indeterminacy of this interface. Debate surrounding everything from anti-terrorism measures to the regulation of industry demonstrates there is "no clear marker of where ensuring effective autonomy ends and the negation of formal autonomy beings".⁶⁹ Nor can any principle of proportionality be relied upon to 'balance' the competing demands of agency and welfare as "[t]he extent of restriction of *formal* autonomy that will be 'necessary' will be contingent on the degree of security that is thought necessary to ensuring *effective* autonomy."⁷⁰ Exactly where the interface between fault-based and absolute and strict forms of liability in criminal law falls is therefore a "politically contingent" judgment, and cannot be

⁶⁸ Ibid., 56.

⁶⁹ Ibid., 55.

⁷⁰ Ibid.

demonstrated by philosophical rationalisation alone.⁷¹ Brudner's attempt to give an abstract, philosophical foundation to this interface fails to capture its historical contingency, and can be characterised as ideological insofar as it masks the fact that where the line is drawn is influenced, if not determined, by concrete interests prevalent in society.

Procedure

Another important contribution to the historical study of modern criminal law is made by Nicola Lacey in a series of articles mapping the development of concepts of responsibility in criminal legal practices from the mid-eighteenth century up to the present day. Whilst Lacey shares with Farmer the concern to highlight the operation of concepts of responsibility based on character in modern criminal law, it could be said that Lacey's argument poses a more direct challenge to the view presented by Norrie insofar as it asserts that character-based concepts of responsibility were prevalent in those practices concerned with individual justice and legitimacy traditionally covered by criminal law doctrine long after liberal individualist ideology had taken root. Lacey challenges the assumption often held by criminal law theorists, and arguably evident in Norrie's work, that the rise of the doctrine of individual responsibility to the status of orthodoxy was a smooth and relatively unproblematic process from the Enlightenment onwards of rationalisation and reform within the criminal law, to which the only main source of opposition was the conservative instincts of some parts of the judiciary.⁷² Lacey argues that as a consequence of this assumption the existence of other concepts of responsibility operating in the criminal law at the same time has been overlooked. In particular, she argues that contemporary focus on concepts of responsibility which focus on capacities of the subject have led to a failure to appreciate the persistence of character-based concepts in modern criminal law, not only historically but up until the present day. In response to these shortcomings she calls for an

⁷¹ Ibid., 54.

⁷² Lacey, "In Search of the Responsible Subject"; Lacey, "Responsibility and Modernity in Criminal Law"; Nicola Lacey, "Space, Time and Function: Intersecting Principles of Responsibility across the Terrain of Criminal Justice," *Criminal Law and Philosophy* 1, no. 3 (September 1, 2007): 233–50, doi:10.1007/s11572-006-9025-7; Lacey, "Contingency, Coherence and Conceptualism."

attempt to understand the historical development of concepts of responsibility in criminal law “in terms of the relationship between evaluations of character and assessments of capacity rather than the linear development of a unitary conception of responsibility.”⁷³ For Lacey, by examining the reasons for the persistence of character-based concepts of responsibility, and how they interact with capacity-based concepts, we can develop a greater insight into the role and function of concepts of responsibility in criminal legal practices, and how they may be shaped by transformations in the wider environment of criminal law.⁷⁴

In mapping the development and interaction of different concepts of responsibility in modern criminal law, Lacey adopts a particular perspective on these concepts emphasising the wider institutional context of the practices of which they form a part. In particular she sees that a satisfactory account of how concepts of responsibility operate within criminal legal practices must recognise that criminal law “faces two rather general problems of co-ordination and legitimation”, of values on the one hand, and of knowledge on the other.⁷⁵ Moreover, responsibility cannot simply be seen to operate only in the formal law as applied by the courts, but to understand them also “as part of an integrated process of criminalisation”, incorporating those pre-trial and post-trial stages that are frequently overlooked by theorists of the criminal law.⁷⁶ As such, although the demand that criminal law be legitimate may be one important component of understanding the development and operation of concepts of responsibility, to focus upon it exclusively, as Norrie arguably does, risks not only distorting the historical development of concepts of responsibility by overlooking the persistence of character-based concepts, but also fails to appreciate the actual nature of those concepts themselves as a part of institutional practices subject to other pressures of coordination.

⁷³ Lacey, “Responsibility and Modernity in Criminal Law,” 274.

⁷⁴ The argument outlined in this section has been pushed further by Lacey in later works, where she argues in relation to contemporary criminal law that character responsibility can be seen to operate not only in pre- and post-trial processes, but also in the formal law itself. Moreover, she draws links between the resurgence of character in contemporary criminal law and its roots in eighteenth century practices. See, Lacey, “Space, Time and Function.”

⁷⁵ Lacey, “In Search of the Responsible Subject,” 368.

⁷⁶ Lacey, “Responsibility and Modernity in Criminal Law,” 258.

Viewing criminal law from the perspective of confronting problems of coordination and legitimation, Lacey sets out to explain the original presence of an emphasis upon character in traditional practices prevailing in the mid-eighteenth century, and the reason why they persisted in criminal law long after Enlightenment ideals which lent themselves to the promotion of capacity-based concepts of responsibility had taken root in English society. With regards to those traditional practices prevailing in the eighteenth century, the dominance of character can be explained in part on the one hand by the coordination needs of those practices. The lack of resources available to the courts for investigating and trying accusations made judgments focussing upon the defendant's character an important part of ensuring the system of criminal justice continued to work effectively. Courts needed to be selective in the cases that they heard, and those they did hear needed to be heard quickly and efficiently. Focus on the defendant's character meant the courts drew upon the resources of the community in the form of local knowledge about the accused and shared values as to their general behaviour. Moreover, allowing the jury to draw upon widely shared norms as to good and bad character as well as indirect knowledge of their social reputation enabled the courts to distinguish those who were deserving of the severe punishments common in the 'Bloody Code' system from those who were not without the need for expensive and time consuming formal procedures.⁷⁷ The reasons why character enabled the coordination of practices similarly grounded its ability to legitimise them. Making criminality a question of good and bad character rooted it in social and moral norms widely shared in the community, enabling criminal law to secure "minimum conditions for peaceful coexistence and the underpinning of some important social values".⁷⁸

The emergence of capacity-based concepts of responsibility from the late-eighteenth century onwards is also analysed from the perspective of criminal law as confronting problems of coordination and legitimation of values and knowledge. In particular, Lacey

⁷⁷ Ibid., 258–261.

⁷⁸ Ibid., 264.

identifies how political and socio-economic transformations in criminal law's environment from the late-eighteenth century onwards posed new problems for criminal legal practices, to which the development of capacity-based concepts of responsibility can be seen as a response. On the one hand, industrialisation led to an increasing proportion of the population living in rapidly growing towns and cities. The new urban environment posed coordination problems for the courts as the tight-knit communities which traditional practices drew upon for knowledge about the defendant's character and values by which to evaluate it became increasingly fragmented under the pressures of greater potential for anonymity and low-level conflict accompanying competitive market relations. Under such circumstances, the ability of a capacity-based concept of responsibility to operate without drawing upon the knowledge or values of the community provided a means of exercising judgment over defendants in an environment where such resources were increasingly scarce.

For Lacey, capacity-based responsibility can also be seen as a response to the coordination problems posed by the changing institutional structure of criminal law, as evidenced in the expansion of adversarial trial procedure and legal representation for defendants, as well as the emergence of systematic law reporting and doctrinal works. Lacey describes this as the 'autonomisation' of the criminal justice system in which its practices underwent a process of rationalisation and professionalisation, within which criminal law itself increasingly came to be seen as a body of knowledge governed by its own set of concepts. Whereas the vague and indeterminate evaluations entailed by the character-based concept of responsibility did not lend itself to the development of objectively verifiable rules and principles which could form part of a body of knowledge, capacity-based concepts did insofar as they reduced responsibility to a matter of technical definition.⁷⁹

On the other hand, for Lacey capacity-based responsibility can also be seen as responding to new legitimisation problems posed by transformations in the criminal law's

⁷⁹ Ibid., 269–271.

political environment, and in particular by the growth of democratic sentiments. The reduction of responsibility to establishing factual psychological states of mind cleansed judgments of the explicitly moral considerations which evaluative standards such as 'malice' or 'wickedness' or other inquiries concerning the defendants character may have invited. Putting responsibility onto a factual basis enabled judgment to be seen as the impersonal application of positive rules, respecting the formal equality of defendants in the process, and dissociated it from the notion that it coercively enforced the particular substantive moral values held by one section of the community only.

Although certain aspects of these transformations in the environment of criminal law may have generated a demand for capacity-based concepts of responsibility, an important aspect of Lacey's argument is that this development was not one of linear progression. Rather, criminal law was subject to forces pushing the development of concepts of responsibility in contradictory directions. On the one hand, capacity-based concepts of responsibility posed as many coordination problems as it may have resolved. Its effective operation in criminal legal practices demanded sufficient resources be allocated to the process of investigating the circumstances surrounding the alleged offence, as well as the introduction of trials of sufficient length to establish before the court the defendant's precise state of mind at the time. As these features only spread very slowly throughout the criminal justice system from the late-eighteenth century onwards, the spread of capacity-based concepts of responsibility across the criminal law was inhibited.

On the other hand, capacity-based concepts of responsibility also posed new problems of legitimation. Lacey suggests that the growth of scientific disciplines and their deterministic accounts of criminal behaviour opened up a new front on which the legitimacy of judgments based upon the capacity concept of responsibility could be challenged. The emphasis upon environmental and biological causes of criminality beyond the control of the defendant undermined the image of the rational and calculating subject, and therefore the integrity of judgments reached according to capacity-based concepts of responsibility. The threat posed by these disciplines invite an explanation of the persistence of character-based

concepts as “eloquent testimony both to the courts’ concern to establish their own autonomous professional expertise and their continuing commitment to – and confidence in – the idea of legal judgment as evaluative rather than scientific.”⁸⁰

Lacey cites the continuing force in doctrine up until the mid-twentieth century of the presumption that one intends the natural or probable consequences of their actions as evidence of the contested development of the capacity-based concept of responsibility during this period. The presumption of intention is characterised as acting as a “crucial bridge” between the contradictory forces operating upon the criminal law and the co-ordination and legitimation problems they posed.⁸¹ For Lacey, the persistence of the presumption, and in particular the shift from it being considered a legal to an evidential presumption, provides two important insights into criminal law during this period. Its status as a legal presumption at the start of the nineteenth century “expressed a certain confidence in the propriety of judge and jury’s substantive judgment: a lack of anxiety about value co-ordination, a confidence in a certain conception of manifest criminality.”⁸² However, throughout the century the presumption appeared to take on the character of an evidential presumption. This shift reflected the criminal law mediating between pressures to legitimise its practices through adoption of capacity-based concepts of responsibility and the fact that the criminal justice system lacked the institutional structure to adequately investigate the defendant’s state of mind. The presumption therefore operated as a way of solving problems of coordinating knowledge; as such “a legal doctrine which found its roots in one social, procedural and legal world survived because it made sense, albeit for different reasons, in another.”⁸³

Summary of the Debate: Legitimacy, Coordination and Responsibility

⁸⁰ Ibid., 268.

⁸¹ Ibid., 271.

⁸² Lacey, “In Search of the Responsible Subject,” 370.

⁸³ Ibid.

The preceding overview highlights two different dynamics informing the historical development of modern criminal law. On the one hand individual justice has been identified as an important objective of criminal law emerging during this period. This dynamic is asserted most clearly by Norrie in his critique of criminal law doctrine's individualist form as ideological, whilst Ramsay arguably expands on this perspective in associating the rise of the responsible subject to orthodoxy in criminal law doctrine with demands imposed upon criminal law in a democratic political community to secure civil rights. Contrasting with the focus on individual justice an alternative dynamic has been posited in the historical development of modern criminal law which aims at highlighting its broadly social character. This dynamic is brought forward most clearly in Farmer's exploration of the diversity of modern criminal law's practices aimed at maintaining public order over and above that of securing individual justice, although Ramsay's incorporation of criminal law's regulatory functions into his argument concerning the ideological character of modern criminal law is of course also an acknowledgement of this social character.

When the prevailing literature is presented in terms of a contrast in emphasis between individual justice and public order, two issues emerge as being at stake in the debate therein. First is the question of when to identify the key period of transition from pre-modern to modern criminal law. Whereas identifying individual justice as the primary dynamic of modern criminal law may lead one to locate the key period of transition in the spread of liberal moral and political philosophy emerging from the Enlightenment (together with its underlying material conditions), an emphasis upon public order may lead one instead to locate it in the growth of the administrative state in the nineteenth century and the transformation in the quantity and quality of the control its agencies exercised over social order. Although the question of the period in which the move from pre-modern to modern was made is of course valuable in and of itself from the perspective of historical inquiry, it is also of practical importance insofar as the answer points towards a rich source of material for analysing and critiquing contemporary developments in criminal law. The second issue at stake concerns the existence of a diversity of practices for attributing responsibility. The positing of individual justice and public order as two contrasting dynamics operating within modern criminal law immediately gives rise to the question of

the nature of the relationship between the practices associated with each. In particular it calls into question where the line between practices concerned with individual justice and public order is drawn, and how it came to fall there, and why this may have come about. Moreover, an awareness of the existence of contrasting dynamics operating in modern criminal law leads to an appreciation that at some level these dynamics interact and respond to each other, in turn potentially informing an understanding of what the precise substance of these dynamics are. In relation to Norrie's argument, for example, if the way in which criminal law claims to secure individual justice is ideological because it masks the interests protected in the substance of the law, how can this account for strict and absolute liability offences where the attribution of liability is clearly determined by the importance of the interest concerned. As such, this second issue has immediate consequences for the historical analysis undertaken by these authors insofar as it shapes the very concepts they use.

Although these authors may differ in the emphasis they place upon individual justice and public order in their accounts of the historical development of modern law, common ground can also be identified between them. In particular, each can be argued to accept the premise that criminal legal practices are shaped ultimately by a concern for legitimacy in the sense of protecting particular values or realising a particular good, even if this is not immediately apparent in all accounts. This is obviously an explicit part of Norrie and Ramsay's arguments insofar as criminal legal practices are perceived to claim legitimacy by virtue of respecting the values of liberal individualism or securing civil or social rights. However, given the emphasis both Farmer and Lacey place on the pressure on criminal legal practices to, in Lacey's terms, coordinate knowledge and values, the claim made here that their arguments evidence a view of criminal legal practices ultimately shaped by concerns about legitimacy is not immediately perceptible and requires further analysis. This claim can be clarified if it is first observed that the use of criminal legal practices as instruments for realising particular policy objectives is not antithetical to the idea that they are ultimately shaped by claims to legitimacy. Whilst it may be true that such practices do not adjudicate upon right and wrong in the sense of determining responsibility on the basis of a moral concept of individual fault, conduct criminalised may be considered 'wrong' in the

sense that it adversely effects a supposed social interest. Insofar as that interest represents an important value, the very protection of this interest by such a practice can be considered part of its claim to legitimacy. This incorporation of the instrumental aspect of criminal law into a general framework whereby the modern criminal law can be perceived to make claims to legitimacy is effectively Ramsay's claim.

4. Modern Criminal Law and the Abstract Individual: Analysis and Critique

In this section a critical analysis of the accounts of the abstract individual of modern criminal law provided by the perspectives in the prevailing literature is conducted. It is argued that tensions are evident in each. In particular, these tensions are seen to be located in the normative force each attributes the abstract individual in modern criminal law. It is then argued that these tensions indicate potential limitations in the historical analysis behind them.

The Liberal State: Norrie and Ramsay

Norrie's argument that the dominance of the orthodox subjectivist approach is an aspect of modern criminal law's ideological function relies upon two distinct but related claims about how its doctrines operate within criminal legal practices. The first, already considered above, concerns the capacity of its doctrines to exclude substantive considerations from intruding upon judgments of responsibility. Although the value of the interests protected by law may be the subject of moral and political contest, by making responsibility a matter of proving factual, psychological states of mind such debates are prevented from impinging upon judgment. The orthodox subjectivist approach therefore strengthens the security of interests protected in the substance of criminal law by removing

the question of their moral or political value from the courtroom. The second concerns how the doctrines developed by the orthodox subjectivist approach are done so with a view to legitimising criminal legal practices. The claim to legitimise practices as a factor in the structure of concepts of responsibility is a natural corollary of the general argument concerning the ideological character of modern criminal law. Although this aspect of orthodox subjectivism does not feature prominently in Norrie's critique of criminal law doctrine, it does so in his historical analysis locating modern criminal law as part of the forms of control developed by the liberal state to contain conflict within a capitalist society, where he associates the abstract individual in legal thought with the liberal tradition of political individualism. The centrality of the abstract individual is seen to have an "expressive function", presenting law as standing up for the individual by protecting the right to freely dispose of body and property where it does not infringe upon the same rights of others, and respecting the principle of equality.⁸⁴

It is important to note the connection between the first and second claims in Norrie's argument. The orthodox subjectivist claim that its doctrines protect the individual and therefore legitimise criminal legal practices is premised precisely on the capacity of its doctrines to exclude substantive considerations from judgment. On the one hand, where such substantive considerations are explicitly relied upon, as in the use of evaluative terms like 'malice' and 'wickedness', the fact that the defendant is held responsible on the basis of values held by the jury means they are judged primarily as a member of the community and as subject to its moral duties and obligations not to infringe the rights of others, breaching the demands of political individualism to respect the inherent moral worth of the individual by not coercively subjecting them to particular values which he or she may not share. On the other hand, if the exclusion of substantive considerations operated by orthodox subjectivist doctrines of individual responsibility were not an essential part of the claim to legitimise criminal legal practices according the dictates of political individualism, their ideological character would be difficult to understand as the normative basis for excluding

⁸⁴ Norrie, *Crime, Reason and History*, 29.

contestation over the moral and political value of interests protected by the law would be cut away, rendering the protection of those interest less secure.

A deeper understanding of Norrie's argument envisioning orthodox subjectivism as part of the ideological function of modern criminal law can be gained by analysing exactly how the dominance of its approach has been realised in actual practices. Norrie's analysis of the law of oblique intention as developed through a series of homicide cases provides a particularly illuminating example of how the orthodox subjectivist approach continues to impose itself upon criminal legal practices even where substantive considerations have significantly shaped the outcome. Norrie sees the tension between orthodox subjectivism and moral substantivism in this area as manifesting itself in the changing formulations of the test for oblique intention, expressed by judges both in the law and in guidelines to the jury. Whereas the orthodox subjectivist approach favours a narrow formulation of the test, restricting findings of oblique intention to cases where death was a virtually certain consequence of the defendant's act, the morally substantive approach favours a more flexible formulation potentially enabling convictions for murder where the risk of death foreseen was of a lesser degree. Changes in the formulation of the test, and the contrast between the versions expressed in formal decisions and those given to the jury, are interpreted by Norrie as reflecting an attempt to capture in the law substantive moral issues in play in particular cases which the narrow orthodox subjectivist approach excludes, in particular the 'colour of the violence' manifested by the motives behind the act causing death and the context in which it occurred.

The form in which the courts articulate decisions seemingly shaped by morally substantive considerations gives an important insight into precisely how the orthodox subjectivist approach imposes itself upon criminal legal practices. Norrie notes that where judgments have clearly attempted to capture such substantive issues, their decisions have still been "cast in orthodox subjectivist terms."⁸⁵ Elsewhere, commenting on one of the cases in which a wider definition of oblique intention was relied upon, he states that "[i]t is

⁸⁵ Ibid., 51.

not that *Hyam*-style reasoning is in itself morally substantive, but rather that the foresight of probability approach admits more cases of indirectly intended death into the law of murder than does the foresight of virtual certainty test.”⁸⁶ The insistence upon using terms referring to psychological states of mind to try and capture substantive considerations which even though they are inadequate to do so could be seen as evidence of orthodox subjectivism’s dominance in judicial culture expressing itself merely in the language of the courts, although such an explanation would seemingly fail to account for those areas where judges have been reasonably comfortable expressing substantive concerns in explicitly evaluative terms.

If we accept that the reference to states of mind in such decisions is not merely a matter of ‘window dressing’ the reasons in terms consistent with the prevailing judicial culture, but in fact signify a dynamic which actually shapes the outcome, and if we accept the premise underlying Norrie’s argument that appeals to legitimacy (ideological or not) are a fundamental dynamic in judgments of responsibility, then the use of orthodox subjectivist terms in these cases concerning oblique intention to express decisions seemingly reached upon substantive considerations presents a particularly stark example of how the two approaches interact in criminal legal practices.

On the one hand, Norrie’s analysis of the tensions in criminal law doctrine suggests the very fact that a decision represents a development in the law means that substantive considerations played a role in shaping the outcome of the case. Developments in the law of oblique intention occur because the courts recognise that the substantive considerations concerning the ‘colour of the violence’ arising in the case before them are sufficiently compelling that to exclude them by applying the orthodox subjectivist doctrine would threaten the judgments ability to claim legitimacy, albeit not necessarily in such terms. The natural corollary to this is that the judgment eventually reached by the court claims legitimacy precisely because the broader test for oblique intention adopted does adequately capture these substantive considerations. On Norrie’s argument, therefore, where a

⁸⁶ Ibid., 56.

decision marks a development in the law of oblique intention by rejecting the orthodox subjectivist approach and adopting a wider formulation instead, it signifies that substantive considerations have played an active role in the process of reaching judgement, and have directly contributed to the claimed legitimacy of the eventual outcome.

However, the reasoning adopted by the courts when widening the test for oblique intention is not 'in itself morally substantive', but instead 'cast in orthodox subjectivist terms'. The question arises as to the nature of the dynamic operating behind the judgment that leads it to be expressed in such terms. Norrie doesn't appear to consider the question in much detail, seemingly relying upon it being a manifestation of the ingrained dominance of the orthodox subjectivist approach in judicial thinking based upon its general ideological power within the criminal law. However, a close analysis reveals that it is difficult within the terms of Norrie's argument to conceive exactly of the nature of the courts' compulsion to express in orthodox subjectivist terms decisions reached on the basis of morally substantive considerations, such as those widening the test for oblique intention. In particular, interpreting this practice through Norrie's general understanding of how the orthodox subjectivist approach interacts with morally substantive considerations in criminal legal practices seems to necessitate adopting two contradictory positions on how the eventual judgment claims legitimacy.

As we have already seen, Norrie locates the role played by orthodox subjectivism in the ideological function of modern criminal law precisely in its doctrines power to legitimise judgments on the basis of their exclusion of substantive considerations from the courtroom. This would suggest that the courts use of orthodox subjectivist terms when widening the test for oblique intention signifies that on some level the legitimacy claimed for the judgment relies upon the exclusion of substantive considerations in reaching it. However, such an interpretation of the inclusion of orthodox subjectivist terms in the judgement seems to be in tension with the explanation offered by Norrie of what lies behind developments in the law such as that witnessed in relation to oblique intention. The very fact of a decision representing a development in the law signifies that the substantive

considerations that would have been excluded by adopting the orthodox subjectivist approach are an immediate factor in the eventual judgment's claimed legitimacy, suggesting further that those considerations were an active part of the process of reaching that judgment. With substantive considerations playing a direct and active role in shaping judgments enacting a change in the law, it is difficult to see how the adoption of orthodox subjectivist terms in such judgments can be perceived as signifying the exclusion of substantive considerations from the process of reaching the judgment. However, Norrie's general argument concerning how orthodox subjectivism operates in criminal legal practices seems to demand that we do view it in such terms.

To conceptualise developments in the law such as that seen in oblique intention through the premises of Norrie's argument therefore seems to ask us to draw upon two contrasting interpretations of the practice behind the judgment. Whilst the change in law itself suggests that exclusion operated by the orthodox subjectivist approach has been rejected and substantive considerations are instead an immediate factor behind the judgment, the casting of the judgment in orthodox subjectivist terms suggests those substantive considerations have been formally excluded from the process in reaching the decision. Moreover, this potential limitation in Norrie's analysis appears to apply equally where the test for oblique intention is narrowed back to the orthodox subjectivist approach in order to deal with "situations which appear morally *not* to deserve the murder label".⁸⁷ Again the very fact that such a decision would represent a change in the law suggests that substantive considerations are an active and direct part of the claimed legitimacy of the judgement, in this case considerations arising from the circumstances of the killing dictating that the defendant should be convicted of murder as he or she would under the broader definition of oblique intention. Interpreting judgments cast in terms of orthodox subjectivism as claiming legitimacy on the basis of the exclusion of substantive considerations seemingly fails to capture the active and direct role of those considerations behind the judgment.

⁸⁷ Ibid.

The emphasis in Norrie's argument upon interpreting developments in law, such as those seen concerning oblique intention, through the notion of a judgement's claims to legitimacy appears therefore to push two mutually exclusive understandings of the practices lying behind such judgments. This suggests a potential limitation in Norrie's general account of the normative and practical aspects of orthodox subjectivism's operation in criminal legal practices. The claim that it is part of the ideological function of modern criminal law rests upon establishing a firm link between its claims to legitimise judgements on the one hand and the exclusion of substantive considerations on the other. However, this understanding does not appear easily capable of accounting for more nuanced instances of its operation, such as the dominance the orthodox subjectivist approach evidenced where judgements seemingly informed by substantive considerations are cast in terms of psychological states of mind. It is not simply that such judgments as a matter of fact have substantive moral and political implications, which the judges may be able to exclude from the court by maintaining the technical and formal language of responsibility. But rather that these substantive considerations are an immediate factor in the legitimacy claimed for the judgment. The core of the difficulty lies in how to account for the apparent normative force of the orthodox subjectivist approach in those practices in which the view that the judgment claimed to be legitimised by exclusion of substantive considerations cannot be maintained. In other words, the normative force of the orthodox subjectivist approach expressed through reference to psychological states of mind seems to rely on a more direct and explicit engagement with substantive considerations than is accounted for when considered from the perspective of being part of the ideological function of modern criminal law.

This uncertainty surrounding the precise nature of the normative force of the orthodox subjectivist approach in criminal legal practices has implications for the historical character Norrie attributes to it. This aspect of Norrie's argument presents the orthodox subjectivist approach as the application of liberal individualist ideology in criminal law, and more generally as a part of modern criminal law's functioning as a form of social control specific to the liberal state and a capitalist social order. By questioning whether the normative force of the orthodox subjectivist approach is indeed linked to its capacity to exclude substantive considerations from the court room, we also question whether the

values it draws upon in claiming to legitimise judgments are those of political individualism. As we have already seen, Norrie's own survey of the origins of criminal law's individualism in liberal political and legal thought heavily emphasises how abstraction in these theories created a highly decontextualized vision of the person, in which considerations arising from the wider social environment in understanding and evaluating human behaviour were excluded from the discourse. Moreover, principles of freedom and equality drawn from this abstract vision of the person emphasised formal freedoms and equality over the concrete conditions in which they are actually realised.

Although Norrie clearly sees orthodox subjectivism as the application of liberal ideology to the criminal law, the precise nature of the link is not mapped out in great detail. In his critique of its approach to *mens rea* doctrines, the political value of orthodox subjectivism claimed for by liberals is subject to little explicit discussion, considered only in the context of criticisms made of *Caldwell*-style objective recklessness that it makes it "easier to convict an individual" and "criminalises people unjustly, and offends against the principles of individual justice upon which the criminal law is supposedly based."⁸⁸ In the absence of more detailed guidance, it can be deduced that Norrie sees orthodox subjectivism's exclusion of substantive considerations from judgements of responsibility as translating the formal and abstract character of liberal individualist principles into criminal law concepts and doctrines.

However, it can be questioned the extent to which Norrie's understanding of orthodox subjectivism fully captures the nature of liberal individualism as a legitimising discourse, in particular that the formal and abstract character of the latter translates into the exclusionary dynamic of the former. This can perhaps best be illustrated by reconsidering the foundations of the moral and political value attributed to the abstract individual by the theories of retributivism and deterrence Norrie identifies as key historical influences informing the ideology of modern criminal law. Whilst the emphasis upon wilful, advertent conduct captured by the vision of the responsible subject underpinning these

⁸⁸ Ibid., 61.

theories may have been important conclusions reached, to present it as a moral and political end itself may be to distort the basis upon which it is ultimately considered valuable. Each placed the responsible subject within a wider system of moral and political value rooted in idealism or utilitarianism in which the 'defence' of the individual demanded to a certain extent recognising the value of interests when judging responsibility for their infringement.

As we saw above, for punishment to be just according to retributivist theory it must only be applied where the defendant has denied his or her own rights as a free individual, from which the need for conduct to be wilful was derived as a principle of responsibility. However, the normative force of this principle does not stand independently from consideration of the particular right which has been infringed. If the practice of punishment taken as a whole ultimately has its justificatory foundation in respect for the inherent moral worth of the individual, particular components of it cannot be considered to have normative force in isolation of other parts of the practice. Holding an individual responsible on the basis of the wilfulness of his or her conduct does not by itself justify the application of punishment unless the right they are being punished for infringing is an interest deemed valuable and intrinsic to individual personality. Respect for the free individual only informs the content and normative force of principles of responsibility as part of the practice of punishment insofar as the practice as a whole respects it.

In the same way that retributivism entailed a holistic evaluation of responsibility and harm upon a common basis of individual right, so did the theory of deterrence in respect of the value of utility. The approach dictates that as punishment entailed inflicting pain upon the defendant, it could only be justified if, by deterring others from committing similar offences, it led as a consequence to an overall increase in the level of happiness throughout society. The general policy of deterrence in criminal law entailed an emphasis on treating the defendant as a rational and calculating subject who in order to be considered responsible for a criminal act should have been advertent to the nature of his or her transgression. Again, however, the content and normative force of such principles of

responsibility is ultimately contingent upon the evaluation of the practice taken as a whole according to the principle of utility. If a right enshrined in law when exercised by its bearers has little or no positive effect on the general level of happiness throughout society, no matter how effective any punishment applied to those who infringe the right may be at deterring others from doing the same, the lack of utility value in the right protected renders such punishment ultimately an unjustified infliction of pain, regardless of whether the defendant's advertence to his or her transgression was a condition of responsibility. From the other direction, the level of advertence demanded by the deterrence theory can be equally contingent upon the utility value of the right the offence prohibits the infringement of. For example, where a right is invested with a high utility value, where even the relatively small infringement of which causes a large increase in overall levels of pain, lower degrees of advertence to the transgression could notionally be justified in the belief that to do so would influence more cautious behaviour throughout society.

The above does not intend to be a detailed exploration of retributivist or deterrence theories of punishment. It does, however, intend to highlight another interpretation of the concepts of individual responsibility underlying these theories which contrasts with that presented by Norrie and which informs much of his argument concerning the ideological character of modern criminal law. Norrie interprets the abstract vision of the person underlying retributivist and deterrence theory as generating principles in which an individual can be held responsible and legitimately punished for infringing another's rights independently of any evaluation of the nature of the right infringed. By contrast, the account presented above suggests that such a sharp distinction between these two questions does not necessarily follow. Given that for punishment as a whole to be justified each aspect of it must be grounded in a single and coherent vision of its normative foundations, the content and normative force of principles of individual responsibility must ultimately be to some extent contingent upon how and whether other aspects of the practice reflect those values. In other words, in the practices envisioned by retributivist and deterrence theorists judging responsibility was not necessarily as firmly differentiated from considerations arising from the substance of the right protected as Norrie seems to suggest. Whilst there may be an important sense in which these theories were ideological insofar as

the rights they identify as universally necessary to individual freedom or as vital to increasing social levels of utility in fact reflect concrete and particular social and economic interests, as well as marginalising questions relating to the conditions in which such rights are exercised, this does not necessarily equate to the practices envisioned by such theories as excluding considerations arising from the substance of the right from judgements of responsibility. The reasoning, calculating subject inhabiting the concept of responsibility underlying retributivist and deterrence theories was not a normative end in itself, but was part of a wider system of moral and political value with the abstract individual at its core which identified certain rights and interests as worthy of protection, giving rise to substantive considerations which informed judgments of responsibility rather than standing independently from them.

The interpretation of liberal individualism offered here enables us to shed some light on the difficulties encountered in Norrie's critique of *mens rea* doctrines outlined above. There we saw that Norrie's view of orthodox subjectivist doctrines of individual responsibility as claiming to legitimise judgments by excluding substantive considerations from the decision struggled to account for certain aspects of the approach's dominance in practice. In particular it failed to explain why judgments in which substantive considerations were an immediate factor behind the decision rather than merely *de facto* implications of it - such as those concerning the law of oblique intention - would be cast in orthodox subjectivist terms, as it is difficult to see such a judgment as claiming legitimacy on the basis of excluding those substantive considerations. It was suggested there that this tension may reflect a more general problem in how Norrie conceives of the normative force within criminal legal practices of doctrines of individual responsibility referring to psychological states of mind.

If we understand orthodox subjectivism as the application of liberal individualism to criminal law, as Norrie does, then by challenging his characterisation liberal individualism in which he draws a sharp distinction between the conditions in which the subject can be held responsible for infringing a right and the evaluation of the substance of the right itself, an

explanation for the difficulty confronted in his critique of *mens rea* doctrine emerges. Appreciating that liberal individualism does not make the rational, calculating subject a normative end in itself, but only attributes normative force to it in the context of a practice which as a whole respects the value of the abstract individual, including the particular rights it protects, has important implications for envisioning how the orthodox subjectivist approach operates in criminal legal practices. In particular, it highlights that the orthodox subjectivist claim to legitimise a judgment is not made on the basis of an *a priori* exclusion of substantive considerations arising from the particular right in question. On the contrary, the orthodox subjectivist claim that its doctrines of individual responsibility legitimise judgments by defending the individual is contingent upon the extent to which the practice as a whole can be considered to do the same. Not only does the orthodox subjectivist claim to legitimise judgments not presume the exclusion of substantive considerations, but could also be seen as demanding that in one form or another they are part of the judgment.

Whereas Norrie's interpretation of liberal individualism leads to a perception of the normative force of orthodox subjectivist doctrines which appears to distort their interaction with substantive considerations in criminal legal practices, the more expansive interpretation offered here arguably points towards a more accurate portrayal. Whilst it may be argued that the abstract values supposedly reflected in the formal rules and principles of modern criminal law are rendered incoherent by the unequal and differentiated character of its environment, and that the courts may have devised techniques of keeping such incoherence at bay, this is quite different from the claim that judicial decisions invoke psychological states of mind in order to present judgments as having been reached independently of substantive considerations arising from the facts. As is implicit in the tracing of shifts and developments in the law in Norrie's own critique of *mens rea* doctrines, judges actively and sometimes quite openly deal with substantive considerations confronted in criminal legal practices. With this in mind, the emphasis upon exclusion in Norrie's account of the interaction of orthodox subjectivist doctrines with substantive considerations appears quite alien from the practice it seeks to analyse. It appears instead that such considerations are given a particular form of expression by the references to psychological states of mind employed by the orthodox subjectivist approach.

The interpretation of liberal individualism presented above permits this more flexible understanding of how orthodox subjectivist doctrines operate in criminal legal practices without forcing us to abandon the idea that it seeks to legitimise judgments according to liberal political values.

The more expansive interpretation of liberal individualism offered here may allow for an understanding of orthodox subjectivist doctrines which more accurately reflects their actual operation in criminal legal practices. However, wholesale adoption of this more expansive interpretation would have important implications for Norrie's claim that orthodox subjectivist doctrines are an aspect of the ideological function of modern criminal law. As we saw above, Norrie sees the ideological quality of orthodox subjectivist doctrine lying in the gap it establishes between criminal law's form, in which it presents itself as defending interests important to individuals universally, and its substance, in which it protects a particular interests over which there may be political conflict. Moreover, the very exclusion of considerations arising from the particular interests protected in the substance of an offence from influencing judgments of responsibility is the very basis upon which orthodox subjectivist doctrines claim to defend the individual. However, the interpretation of liberal individualism this claim is rooted in has been questioned in this section for the way in which it makes the rational, calculating subject a normative end in itself.

In the alternative interpretation developed here a judgment from which substantive considerations were excluded from the question of responsibility would not necessarily be able to claim to be defending the individual according to the demands of liberal individualism. On the contrary, the interpretation of liberal individualism offered here posits that the identification of proper conditions of responsibility is not entirely separable from an evaluation of the value of the right protected, insofar as both are part of the same general practice which must be just according to a single criterion of value. Norrie's interpretation of orthodox subjectivism is therefore incompatible with this interpretation of liberal individualism. The account of liberal individualism developed in this section does not necessarily generate any normative grounds for maintaining a sharp distinction in criminal

legal practices between determining responsibility and considerations arising from the nature of the right in question. If this interpretation of liberal individualism is accepted, it is difficult to see how the exclusion of substantive considerations effected by the application of orthodox subjectivist doctrines can form the basis of a claim to defend the individual, ideological or not. Not only does liberal individualism not demand such an exclusion, but seems to demand that at some level responsibility necessarily entails consideration of the overarching purpose for which the defendant is being held responsible – the infringing of rights necessary to the enjoyment of individual freedom and equality. Liberal individualism therefore demands that substantive considerations may, or must, play a role of some significance antithetical to the emphasis upon exclusion.

If the tension in Norrie's argument can be attributed to an uncertainty in the relationship he establishes between the normative force of the abstract individual and the role of positive law in identifying and protecting interests, the tension which will be illustrated in Ramsay's argument can also be seen to have a similar origin. The critical analysis of Ramsay's argument conducted here draws a distinction between an analytical and a critical component therein, with the former referring to the connection he establishes between concepts of responsibility and civil and social rights, and the latter to the ideological character he attributes to these concepts of responsibility. An important feature of the analytical component of Ramsay's argument linking concepts of responsibility with democratic citizenship is the marginal role attributed to positive law. In fact, this aspect of Ramsay's argument seemingly precludes incorporating a more prominent place for positive law. Concepts of responsibility are understood as key to attempts to legitimise criminal legal practices insofar as they further the purpose of securing civil or social rights. Making the operation of concepts of responsibility in criminal legal practices dependent upon analysis of the substantive moral and political purpose of particular offences is difficult to reconcile with the method of analysis associated with a prominent role for positive law in such practices; in particular breaching the distinction maintained by the latter between on the one hand identifying the content of legal concepts by reference to authoritatively enacted rules and principles and on the other hand the evaluation of their moral and political content. The marginalising of positive law is particularly noteworthy given the

practical importance of positive law in securing civil and social rights during the period marking the emergence of the democratic state, evidenced by the proliferation of statutory instruments and consolidation of the doctrine of precedent and *stare decisis*. Ramsay's argument does not, of course, deny the instrumental importance of positive enactments in securing civil and social rights, nor that both fault-based and strict and absolute standards of liability were enshrined in positive rules and principles. However, whatever impact the increasing practical significance of positive law may have had upon criminal legal practices, it is not explicitly acknowledged in Ramsay's analysis of either the content or the normative force of concepts of responsibility operating within those practices.

The marginalising of positive law in the analytical component of Ramsay's argument does not only have significant implications for how concepts of responsibility seek to legitimise criminal legal practices, but also for how we are to understand the content of those concepts. This can best be illustrated by comparing the concept of individual responsibility as associated with the civil aspect of democratic citizenship developed by Ramsay with its orthodox doctrinal expression, where a *prima facie* tension can be identified between the approaches adopted by both, suggesting in turn significant differences in the content of the concept underpinning each. As we have seen, the analytical component of Ramsay's argument identifies individual responsibility as an expression of the demand for formal equality and individual freedom underlying civil rights in the criminal law, emphasising in turn the conceptual link between criminal responsibility and the moral and political purpose of the law. The concept of individual responsibility in orthodox doctrinal analysis, however, is generally guided by the desire to maintain a firm distinction between the question of liability and the substantive purpose of any particular offence, as is expressed by abstracting evaluation of the defendant's state of mind from other matters arising from the interest infringed in any particular instance, including whatever moral or political value may be attributed to it, and the nature of his or her conduct, including whatever moral or political attitude or disposition may be expressed by it. Although the substantive outcomes generated by the concept of individual responsibility reached by the analytical component of Ramsay's argument and that underlying doctrinal analysis may when applied to cases be the same, the latter attributes an *a priori* significance

to the distinction between the defendant's state of mind and other aspects of the offence. The reasons for this difference in approach can be traced back to the absence of positive law from the analytical component of Ramsay's argument. Whereas for Ramsay the content and normative force of individual responsibility derives directly from the purpose of the law in securing civil rights, dissolving any *a priori* status to the distinction between the substance of law as positively enacted and the evaluation of its purpose, in its doctrinal expression this distinction guides the analysis, assuming the capacity and authority of law to identify interests to be protected by positive enactment and articulating a concept of individual responsibility whose content and application is not contingent upon the substance of the particular offence.

In contrast to the marginal role attributed to positive law in the analytical component of Ramsay's argument, the critical component seemingly envisions a much more significant role. As we have seen, one of the main claims made in this aspect of Ramsay's argument is that the normative claims of the civil and social aspects of democratic citizenship are in constant conflict with one another, with Ramsay drawing upon the political and legal experience of the democratic political community to demonstrate that the point at which formal agency is guaranteed without sacrificing effective autonomy, and vice-versa, cannot be rationalised by reference to abstract principles of proportionality or other similar attempts at giving it a philosophical foundation. As a consequence, where the line between formal agency and effective autonomy is drawn in practice should be seen as the outcome of a political decision, and claims that political and legal institutions are securing civil or social rights should be regarded as 'ideological' insofar as this decision is shaped by concrete interests imposing themselves upon decision-makers. Consequentially, the identity of a particular criminal legal practice as securing civil or social rights, and therefore the concept of responsibility associated with the furtherance of this purpose, is presented as determined by political decisions made by the courts and the legislature. Whereas the analytical component of the argument suggests that identifying the 'proper' standard of liability to be applied involves moral and political evaluation of the substance of the offence in question, the critical component denies that such an evaluation can lead to a certain

outcome, and that instead the standard of liability to be applied can only be identified according to its positive enactment in statute and judicial decisions.

Although the analytical and critical components of Ramsay's argument may envision significantly differing roles for positive law in their analysis, this is of course not meant to undermine the coherence of the overarching argument linking concepts of responsibility prevailing in modern criminal law to democratic citizenship. From Ramsay's perspective, the suggestion that these differences in the role attributed to positive law may indicate a more fundamental problem in his overarching argument should be put to rest by clarifying the different functions performed by its analytical and critical components. Whilst the analytical component illuminates how concepts of responsibility are an aspect of how criminal legal practices claim legitimacy by appealing to the purpose of securing civil or social rights key the enjoyment of citizenship of a universal and democratic character, the critical component seeks to expose how these concepts actually operate to protect particular concrete interests. The analytical component therefore speaks to the ideal quality of concepts of responsibility where emphasis is placed upon the appeal they make to values, and the critical component speaks to their historical quality where emphasis is placed upon the necessity of positive enactment and, ultimately, state coercion in their application.

At this point, the question arises as to how these contrasting perspectives on the relationship between positive law and concepts of responsibility can be maintained within a single argument historicising the latter as part of modern criminal law's environment of democratic citizenship. As long as it can be demonstrated that claims made in the analytical component of the argument do not interfere with those in the critical component, and vice-versa, the argument retains its coherence. However, such interference could arise in two ways. First, if the functioning of concepts of responsibility as a part of claims for the legitimacy of criminal legal practices cannot be explained without reference to the role of positive enactment in their actual application this would suggest that the status of concepts of responsibility as enacted in positive law are a key part of their claim to legitimacy,

indicating that the analytical component of the argument does not fully account for the normative force of concepts of responsibility. Second, if the actual operation of concepts of responsibility in criminal legal practices cannot be explained without reference to their legitimising purpose in securing civil and social rights, this suggests that the distinction between formal agency and effective autonomy does have some form of abstract validity which guides criminal legal practices, and that where the line is drawn in practice is not necessarily merely the reflection of concrete interests, indicating that the argument does not fully account for the specific, historical character of these concepts.

Given the different roles attributed to positive law in the analytical and critical components of Ramsay's argument, it suggests itself as the most appropriate starting point from which to inquire as to whether there is interference in their respective accounts of criminal responsibility in the sense outlined above. In particular, it is useful to explore exactly how and why positive law is marginalised in the analytical component of Ramsay's argument, and the extent to which this is consistent with its prominence in the critical component. The answer to the first part of this question lies in the assertion that the determination by political or legal institutions as to whether particular criminal legal practices are directed towards securing civil or social rights forms no part of criminal law's claim to legitimacy in an environment of democratic citizenship. Corresponding to this is that criminal responsibility's part in legitimising criminal legal practices is not contingent upon positive enactment in judicial decision or statute which would identify a particular practice as concerned with civil or social rights. Ramsay therefore characterises the claim to legitimacy made by criminal legal practices as not only presupposing the distinction between civil and social rights, but moreover an acceptance that the limit between their normative purposes in securing formal agency or effective autonomy can be identified in the abstract without resort to political decision. The marginalising of positive law in the analytical component of Ramsay's argument therefore presumes that those who claim legitimacy for criminal legal practices by appeal to civil and social rights believe such rights have the normative force to do so independently of their particular determination by political and legal institutions.

From the perspective Ramsay's overarching purpose to locate modern criminal law and its concepts of responsibility in the historically specific experience of democratic citizenship, the assertion underlying the analytical component of his argument that claims for the legitimacy of criminal legal practices accepted the normative force of civil and social rights independently of their determination by political and legal institutions is questionable. By isolating the normative force of civil and social rights from the question of their political determination, abstracting them from the institutional context in which they actually operated, Ramsay risks overlooking an important quality of such rights which identifies them as part of the general concept of democratic citizenship which is the focus of his argument. It can be argued that from the perspective of democratic citizenship an important part of the normative force of civil and social rights lies in their capacity to make claims on democratic institutions as part of a political discourse, rather than solely in their abstract value. This in fact forms a part of the critical component of Ramsay's argument, where the relationship between these rights and democratic institutions is acknowledged by recognising the importance of political decision in their determination and, in relation to criminal legal practices, positive enactment. However, rather than making this political determination of civil and social rights a part of the analysis of the relation between concepts of responsibility and claims for the legitimacy of criminal legal practices, Ramsay characterises it as a manifestation of the ideological quality of such rights. This arguably distorts how civil and social rights operate in the context of democratic political communities. Rather than speaking to the ideological quality of civil and social rights, the role of political determination can equally be seen as an acknowledgment of how concrete interests do in fact inform political discourse centred around such claims, and the need therefore to subject them to the scrutiny of the democratic process.

If we accept that in order to develop a proper understanding of the normative force of civil and social rights we must regard them as inseparable from the wider context of their determination in practice by democratic institutions, then certain limitations appear in Ramsay's envisioning of concepts of criminal responsibility as having their origins in the

wider environment of democratic citizenship. In particular, the marginalising of positive law in the analytical component of Ramsay's argument appears unsustainable as the role of positive law in criminal legal practices comes to be seen not just in instrumental terms but as part of the normative foundations of those practices. Where the political significance of determining what civil and social rights demands is an acknowledged part of practice, their prior determination in the positive enactments of authoritative institutions are themselves attributed normative significance. This is arguably not reflected in the analytical component of Ramsay's argument, where claims for the legitimacy of criminal legal practices are envisioned to be made by direct appeal to the substance of civil and social rights, regardless of this wider institutional context. Whilst highlighting the institutional context of civil and social rights does not necessarily entail that positivistic rather than substantive styles of reasoning actually dominated criminal legal practices, it does suggest that positive law did at least enjoy a normative status to some extent independent of the substance of its particular enactments which should be taken into consideration when analysing the relationship between these rights and how concepts of responsibility may claim to legitimise practices.

Community Values and the Common Law: Farmer and Lacey

As we have seen, Farmer and Lacey question the view that the concern for individual justice was as dominant a force in the development of modern criminal law as is often assumed by criminal law theorists. Whilst this assumption underpins Norrie and Ramsay's argument concerning the ideological quality of modern criminal law, for Farmer "the analysis in these terms does not attempt to understand the historical development of the law."⁸⁹ However, this reassessment of individual justice in modern criminal law undertaken by Farmer and Lacey should not be interpreted as abandoning it as an important part of the analysis. Firstly, as we have already seen, in certain contexts the concern for individual justice is still considered an important dynamic shaping the outcome of criminal legal practices. In the context of illuminating the importance of considerations of public order in

⁸⁹ Farmer, *Criminal Law, Tradition, and Legal Order*, 173.

the development of modern criminal law, Farmer states that “[t]here was not so much a displacement of a system of individualised justice as a re-ordering.”⁹⁰

Second, an adequate analysis of the role of theory as a part of the practice of criminal law demands engaging with what the wider significance of representing the criminal law as concerned with individual justice may be. Theories seeking to uncover the rationality underlying criminal law and identify its underlying values are themselves aspects of the practice of criminal law, and therefore bear some relation to those practices they claim to interpret, even if such connections may not always be immediately apparent. Whilst the extent to which these works are an accurate representation of actual criminal legal practices may be debatable, their influence upon the ways in which we have imagined the unity of criminal law cannot be doubted, especially since the mid-twentieth century when the idea of criminal law as having a general part became an accepted orthodoxy and much theoretical work was directed towards clarifying its core concepts and doctrines. As Lacey comments, we should aim to analyse “the development of conceptual frameworks themselves as social practices which form one of the objects of social-theoretical analysis.”⁹¹ It is arguably the case therefore that a study of the historical development of modern criminal law is not complete without an attempt to locate the role of theory within that development and the reasons behind the individualism informing such works.

Common to both Lacey and Farmer’s analysis of general theories of criminal law is the notion that they are part of a ‘defence’ of the criminal law. As we have already seen, in his historical analysis Farmer sees modern criminal law as characterised by its becoming a tool in the governance of public order, of which an important consequence was the transformation of many criminal legal practices into instruments for maintaining public order and implementing policies in which stress was placed upon the quick and efficient processing of cases and the use of knowledge concerning character provided by policing or administrative agencies, arguably at the cost of the courts traditional function of

⁹⁰ Ibid., 140.

⁹¹ Lacey, “Contingency, Coherence and Conceptualism,” 17.

adjudicating right and wrong. As the instrumentalising of its practices poses a threat to the criminal law's status as a distinct technique of governing social behaviour, Farmer analyses criminal law theory's individualism in this context as an example of where "the autonomy of the person is used to establish and defend the autonomy of the field of criminal law".⁹² Along similar lines, Lacey identifies the construction of general theories of criminal law around *mens rea* doctrines with a desire to "rationalise the autonomy of criminal law and the distinctive role of the legal profession."⁹³ Against the background of a proliferation of determinist discourses laying the ground for alternative strategies of social control focussed upon welfare or rehabilitation, the development of *mens rea* doctrines with a focus on individual responsibility identified the criminal law as a "discrete area of specialist social knowledge and practice, answering both the demands of legal professional interests and those of a political establishment whose legitimising ideology was predominantly individualist."⁹⁴ In a period where the criminal justice system was becoming increasingly dominated by administrative and regulatory practices, imagining the order of criminal law as organised around a general part comprised of sophisticated *mens rea* doctrines worked to defend its territory by affirming its identity as a distinct technique of social control.

Both Lacey and Farmer's analysis of criminal law theory starts from the need to appreciate the gap between the image of criminal law presented in these accounts and the actual reality of its practice. As we have already seen, both Farmer and Lacey seek to illustrate how dynamics other than a concern for individual justice have shaped criminal legal practices, in particular the maintenance of public order and the need to coordinate and legitimise values and knowledge. Either because of the pressure of limited resources or the prioritising of other policy-oriented goals, many criminal legal practices have not necessarily demonstrated an obvious concern to ground their judgments upon a sophisticated account of the conditions in which it is fair to hold a defendant responsible for their conduct. Whilst for Farmer and Lacey this may be the reality of much of modern criminal law, it is not obviously reflected in that individualist tradition of criminal law theory. The image of

⁹² Farmer, *Criminal Law, Tradition, and Legal Order*, 172.

⁹³ Lacey, "Contingency, Coherence and Conceptualism," 32.

⁹⁴ *Ibid.*, 33.

criminal legal practices underlying these accounts is one where principles drawn from the value of individual autonomy underlying the law shape the interpretation and application of rules and doctrines, guided by the general concern that conviction must be fairly imposed upon the defendant. As Farmer comments in his overview of G.H. Gordon's *The Criminal Law of Scotland*, the analysis contained in general theories of criminal law show a "determined attempt to present the moral individual as the centre of law."⁹⁵ This guiding motive seemingly persists even where it is not reflected in the state of the actual law or the reality of its practices.

If we accept that the idealistic image of criminal legal practices presented in general theories of criminal law do not necessarily reflect the more practical and policy-led concerns shaping many actual practices, the question arises as to what aspects of the criminal law are drawn upon in constructing these theories, and how theorists come to focus their analysis on these areas in particular. Lacey explores these questions through an account of the basic methodological problems confronting the criminal law theorist, identifying an inevitable tension between the desire to present the criminal law as having a system or order inherent to it, and the 'messy' reality of criminal legal practices in which a diversity of conflicting and contradictory dynamics can be seen to be in operation.⁹⁶ In light of this, the concepts which the theorist may develop to interpret these practices and illustrate their rationality will inevitably fail to account for all actual instances of that practice. The conclusion Lacey draws from this is that all theories of criminal law which seek to explicate its system and order must inevitably be partial in their representation of its practices. For Lacey, this manifests itself in general theories of criminal law, both orthodox and critical, in their overwhelming focus on the narrow area of practice traditionally covered by doctrinal works. Lacey's emphasis here is that as a consequence of this narrow focus, large swathes of criminal law practice are excluded from the theorist's analysis, especially those areas of the criminal law more closely identified with its regulatory function. As a consequence, the claim by some theories to uncover 'general' features of the criminal law can be challenged

⁹⁵ Farmer, *Criminal Law, Tradition, and Legal Order*, 169–170.

⁹⁶ Lacey, "Contingency, Coherence and Conceptualism," 12–21.

by trying to identify which practices form the primary focus in developing its principles and doctrines, and which are seemingly excluded.

An awareness of the partiality of general theories of criminal law's representations of criminal legal practices guides Farmer's analysis also. He argues that the law of homicide in particular forms a disproportionate influence in the analysis upon which such theories are constructed, especially those theories which seek to present the criminal law as underpinned by individualist principles. Again citing Gordon's *The Criminal Law of Scotland*, Farmer highlights how much of the focus of the analysis, particularly that concerning omissions and causation, in fact only has direct relevance for a select number of common law offences, and the relevance of some narrowed even further to homicide alone. Farmer also notes the strong correlation between the basic structure of liability found in general theories of criminal law, where intention, recklessness and, perhaps more contentiously, negligence are distinguished according to the level of blameworthiness attached to each state of mind, and the distinction drawn between murder and manslaughter in homicide based upon their *mens rea* requirements. Moreover, the influence of the law of homicide upon general theories of criminal law is arguably rendered more apparent when one considers that homicide is one of the only offences in which this structure is explicitly adopted.

By bringing forward the (inevitably) partial nature of criminal law theory's representations of criminal legal practices, both Farmer and Lacey highlight the extent to which the shape of such theories are the product of decisions made by their authors with regards to the areas of practice they choose to analyse. This observation invites further questions concerning the factors which may have influenced these decisions. The extent to which developments in criminal law theory can be seen to develop according to trends mirroring changes in the practice and environment of criminal law suggests one should avoid simply interpreting the decisions of the theorist as guided by personal preferences concerning the values which the theorist may wish to see reflected in the law, although this may of course be a factor. One should aim to identify the wider significance of the decisions

made by contextualising them within the functioning of the practice of criminal law as a whole, and, as we had cause to mention above, view the development of conceptual frameworks themselves as objects of social-theoretical analysis.⁹⁷

In order to assess Farmer and Lacey's claim that general theories of criminal law work to defend the autonomy of the criminal law, it is important first to explore how these theories come to take the specific shape they do. With this in mind, it is useful to start from the contention made by both, albeit more explicitly by Lacey, that these theories possess an ideological quality, as it invokes the impression of there being an logic underlying the selection of practices which speaks to something about the general character of modern criminal law. Whilst the ideological quality of these theories is perhaps implied in Farmer's argument in his awareness of the narrow range of practices which come within its analysis rather than directly argued for, Lacey explicitly labels such theories an "ideological counterbalance to the increasingly managerialist reality of criminal legal practices".⁹⁸ Doctrinal rationalisations "serve to repress aspects of practices which raise intractable problems of legitimation",⁹⁹ with the primary examples of such marginalised issues being the question of the substantive interests protected by particular offences which are relegated to the 'special part', regulatory offences employing strict liability, and rules of evidence and procedure. These are areas which have "escaped the systematising impulses of the doctrinal mapmakers, yet which have real effects for the subjects of criminal law."¹⁰⁰ Not only do certain practices simply not figure in the view of the theorist when conducting their analysis, but where the boundary falls between what is inside and outside is determined by whether the practice is perceived to express those values which comply with the image of criminal law the theorist seeks to construct. Those practices which do not are not simply left out of the analysis, but are actively 'marginalised' and 'repressed' by it.

⁹⁷ Ibid., 17.

⁹⁸ Ibid., 33.

⁹⁹ Ibid., 37.

¹⁰⁰ Ibid., 19.

For Farmer, the focus on the law of homicide he identifies in his analysis of general theories of criminal law is part of an attempt to ground criminal law in individualist values. In this context, homicide is attributed its symbolic role by virtue of the value of the interests it protects. To take life is naturally the greatest harm one can inflict upon another's autonomy, so its status as an area where the principles informing the wider practice of criminal law are subject to the greatest scrutiny should perhaps be seen as no surprise. However, Farmer's argument goes beyond this to assert that the law of homicide's prominence lies in how it represents the nature of criminal law itself; in particular how it represents the legitimacy and rationality of criminal legal practices as founded ultimately upon protecting moral values, in particular that of individual autonomy. Life is an interest invested with a 'pre-political' status, by which it is meant its value is immediately perceptible to the community, as is any harm done to it. Importantly, if considered as a pre-political interest, the status of any harm inflicted upon it as a 'crime' is not contingent upon its positive enactment, but can be deduced from the moral quality of the act. The focus on homicide in criminal law theory therefore portrays a vision of criminal law in general as ultimately concerned with the protection of individual autonomy, where "wrongs against personality occupy a special foundational position in the law, as opposed to those actions which merely harm defined social interests."¹⁰¹

The connection between the individualism of criminal law theory and the desire to defend the autonomy of the criminal culminates in how the former implicitly invokes an understanding of its practice rooted in the common law tradition which reserves to the judiciary the authority to observe and criticise other aspects of the practice of criminal law by virtue of their status as the guardians of the moral life of the community in which law ultimately has its foundation. Farmer again relies upon the prominent place of the law of homicide in criminal law theory in order to make this claim. He describes homicide as the 'perfect crime' from the perspective of those seeking to defend the autonomy of the criminal law as within its practice can be seen "the realisation of the genius of Scots law" in which there is a "synthesis of practical reason, community and national character".¹⁰² The

¹⁰¹ Farmer, *Criminal Law, Tradition, and Legal Order*, 171.

¹⁰² *Ibid.*, 145.

prevalence of this view amongst the judiciary is illustrated most explicitly in an overview of comments praising the character of murder in Scots law as an example of law and community working in harmony.¹⁰³ In particular, the refusal by the courts to reduce the requirement of ‘wickedness’ to a formal and technical definition demonstrates a “willingness to allow juries, and hence the ‘community’, to make moral decisions.”¹⁰⁴ Moreover, any attempt curb the jury’s moral judgment “would be an attack on the character of Scots law.”¹⁰⁵ Terms are to be given their “ordinary and natural meaning”, whilst attempts to reduce all aspects of murder to technical definition would end up being “too broad or too narrow” in capturing conduct deserving of the label.¹⁰⁶ The synthesis of law and community therefore operates through murder in the ‘popular’ quality of its practice where it prioritises giving effect to the moral judgment of the jury over strict, formal definitions. As such, by drawing predominantly from the law of homicide for the concepts and doctrines through which it presents criminal law as rooted in the protection of the value of individual autonomy, criminal law theory shows itself to contain a “remarkable and highly revealing elision of the supposedly abstract foundations of criminal law and their presumed origins in the common law.”¹⁰⁷

A similar link between the individualism of criminal law theory and the desire to defend the autonomy of the criminal law via the implicit invocation of its common law origins can be seen in Lacey’s argument. For Lacey, the focus of the analysis in theories of the general part on rules and principles relating to the *mens rea* requirements found in only a narrow range of primarily common law offences reflects a desire to represent criminal law as fundamentally concerned by the question of when it is and is not fair to criminalise individuals. Lacey locates this desire in the wider social and historical context of the mid-twentieth century period in which general theories emphasising the importance of individual responsibility were becoming orthodoxy. In particular, she presents their emphasis upon individual responsibility as a product of attempts to confront questions

¹⁰³ Ibid., 160–166.

¹⁰⁴ Ibid., 165.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid., 164.

¹⁰⁷ Ibid., 171–172.

being asked of the ethical and political legitimacy of the criminal law in the face of a perceived increase in law's power of criminalisation over individuals, triggered by an expansion of its regulatory functions and extension of the social terrain over which it exercised jurisdiction. These developments in the wider practice of the criminal law, in combination with increasing social mobility promoted by economic and industrial development and the spread of democratic and egalitarian political sentiments, gave "a new spin to the ethical demands of the individualism already expressed in nineteenth century *laissez faire* liberalism", and "favoured the construction of the unequal impact of criminalisation as an ethical challenge to criminal law's legitimacy."¹⁰⁸ Lacey cites as evidence of the normative purpose underlying such theorising Williams' desire that the general part form a principled code to be employed in the immanent critique of both summary and indictable offences, in contrast to Stephen's earlier project for codification which was restricted to indictable offences only.¹⁰⁹

Although Lacey does not bring out the sense in which criminal law theory implicitly invokes a vision of the common law origins of criminal law as strongly as Farmer does, it can still be seen to work in the background of her argument. In general, Lacey does not appear to engage in much detail with the character of the individualism informing this strand of criminal law theory, either in terms of its underlying philosophical premises, or the precise manner in which it envisions its values being realised through criminal legal practices. Instead, she focuses her analysis on showing how the simple positing of these values as a part of practice puts forward a particular vision of criminal law which does not necessarily reflect the reality of much of modern criminal law. Despite this, one can still see that in certain aspects of her argument Lacey sees this tradition of criminal law theory as invoking a vision of the common law origins of criminal law. This is arguably evidenced in her claim explored above concerning the partiality of criminal law theory, focussing only on that narrow range of primarily common law offences that have traditionally formed the object of doctrinal analysis. However, the basis of this individualism in the moral life of the community is asserted more explicitly elsewhere, for example where she claims that the

¹⁰⁸ Lacey, "Contingency, Coherence and Conceptualism," 33.

¹⁰⁹ Ibid., 31.

type of doctrinal analysis underpinning theories of the general part where “conditions of responsibility are sometimes treated as if they *constituted* the practice of attribution” have “perpetuated the image of a strong link between criminal law and widely shared ‘community values.’”¹¹⁰ The sense that the vision of criminal law presented in criminal law theory invokes its common law origins is evident where it is contrasted to the “increasingly managerialist reality of criminal legal practices” in which “trial by jury is relatively rare”, seemingly implying that the criminal legal practices envisioned by the general part are those in which the jury, as representatives of the community, continue to play a central role.¹¹¹ In all, it can be seen that in certain aspects of Lacey’s argument she appears to share the view held by Farmer of a connection between the individualism of criminal law theory and the common law origins of criminal law, albeit the connection may not be made in such direct terms.

Whilst the above explores Farmer and Lacey’s argument that criminal law theory defends the autonomy of criminal law against its instrumentalisation by presenting individualistic values as being central to its practice, it is important to appreciate how these claims may be reflected in the actual doctrines developed by such theories insofar as they are the means by which it is envisioned criminal legal practices may comply with such values and so be legitimised. Such an inquiry takes us away from the question of these doctrines substantive origins in common law offences considered so far, and more directly onto the specific form which they take. In the contemporary context the most defining characteristic of these doctrines are their general and abstract form, as expressed in the idea of a general part of criminal law comprised of *mens rea* doctrines applicable throughout the criminal law. The generality claimed for such doctrines is of course acknowledged by Farmer and Lacey. As we have already seen, Farmer’s analysis of Gordon’s *The Criminal Law of Scotland* seeks to go behind the general and abstract form of the doctrines developed therein to uncover that in practice their application is limited to homicide alone, whilst the fact that these theories claim to give a general view of criminal law despite excluding a large swathe of its practices forms the basis upon which Lacey alleges the ideological character of such

¹¹⁰ Ibid., 38.

¹¹¹ Ibid., 33.

theory. The formal and abstract quality of these doctrines must therefore be seen as an integral part of the defence of the criminal law's autonomy, insofar as they are part of the process by which it is envisioned the individualist principles which are claimed to underlie the law are realised throughout the criminal law, including those practices which in reality bear little obvious connection to these principles.

We can see therefore that for Farmer and Lacey there are two components to how criminal law theory defends the autonomy of the criminal law. First, presenting criminal law as having a moral foundation in protecting the individual invests the courts with the authority to observe and criticise legal developments, regardless of whether they have their source in the common law or positive enactment. This view identifies the protection of certain key values as integral to the identity of criminal legal practices, 'trumping' the view of such practices as instruments for implementing policies which are defined outside the court. Second, the generality claimed by criminal law theory for its doctrines arms the courts with the tools to realise in practice the principles underlying the law, again regardless of a particular offences source in common law or positive enactment. Their formality means the validity of these doctrines is not contingent upon the particular substance of the offence in question, bringing within their potential scope of application those practices geared towards the realisation of a particular goal or policy associated with the regulatory function of criminal law.

Whilst in Farmer and Lacey's argument these two features of the individualism of modern criminal law work together in defending the autonomy of the criminal law, it will be argued here that there is a tension between them. This tension can begin to be seen by highlighting how each component attributes a very different quality to the individualism informing criminal law theory. On the one hand this individualism is attributed a very abstract character informed by a vision of the person insulated from the diversity of circumstances that may attend their confrontation with the law. This interpretation, which is most consistent with the orthodox view of criminal law theory's individualism, is prominent where Farmer and Lacey explore the formal and abstract nature of the doctrines

developed by these theories as part of their claim to generality. Although both go on to critique this claim to generality by exposing the narrow range of offences from which these doctrines are deduced, it is still acknowledged to be an important part of how these doctrines form part of the defence of the criminal law's autonomy by potentially bringing those practices within its scope which in reality are dominated by policy objectives rather than the adjudication of right and wrong. Moreover, Lacey sees the abstract form of these doctrines as an important part of how they claim to legitimise criminal legal practices, as the ethical question posed by an expansion of the powers of criminalisation in the mid-twentieth century could only be adequately responded to with "a firmer conception of the basis on which criminal responsibility could be attributed to individuals", and that "this conception had to be one which was independent of the substance of criminal law's prohibitions."¹¹² In this aspect of Farmer and Lacey's argument, therefore, the individualism of criminal law theory is associated with an *a priori* distinction between conditions of responsibility and the substance of a particular offence.

On the other hand this individualism is attributed a more communitarian character where the individual is identified as an object worthy of protection by virtue of its recognition as such by the community, rather than being deduced from philosophical metaphysical premises. This interpretation of criminal law theory's individualism comes across most clearly where Farmer and Lacey locate its substantive origins in primarily common law offences, or in Farmer's case in homicide more specifically. In doing so they do not simply highlight the narrow focus of criminal law theory, but identify its individualism in some sense with the substance of those common law offences. As we have seen, Farmer identifies the specific character of common law offences with the 'pre-political' character of the interests they protect, a view also seemingly expressed by Lacey's talk of 'community values' and the role of trial by jury, emphasising the sense in which the value of such interests and harms done to them are manifest to the community, as opposed to the positivist view that normative force is attributed to a particular interest by the fact of enshrinement in law alone. This in turn has important implications for the sense in which

¹¹² Ibid.

doctrines and principles of responsibility can be considered 'individualist'. Rather than conformity with individualist values being a question of inquiring into the conditions in which it is fair to hold a defendant responsible for the breach of positively enacted legal rule, it is instead made contingent upon judging the defendant's conduct in light of the community's evaluation of the specific harm to individual personality that the defendant is alleged to have inflicted. In this aspect of Farmer and Lacey's argument, therefore, the individualism of criminal law theory does not recognise any *a priori* distinction between conditions of responsibility and the substance of the particular offence in question, but rests on a more holistic evaluation of the defendant's conduct.

We can therefore see that Farmer and Lacey's argument identifies two different types of individualism in criminal law theory. Whilst one identifies the moral status of the individual in isolation from the community, the other emphasises how this status is recognised by the community itself. Within the idealistic vision of modern criminal law put forward by these theories these two different types of individualism do not necessarily come into conflict, as the nature of criminal legal practices and the possibility of a multiplicity of practices never comes directly into question but are instead assumed to be shaped by questions of legitimacy and individual justice. However, in analysing these theories from a wider historical perspective as attempts to defend the autonomy of the criminal law against its instrumentalisation, Farmer and Lacey's attempt to draw upon both types of individualism arguably leads to limitations in their explanations.

On the one hand, the type of individualism posited in isolation of the community is necessary to defend the autonomy of the criminal law insofar as its imagining of the individual as imposing normative demands on criminal legal practices irrespective of the community's perspective on the particular interests affected in the case before them enables the development of doctrines of sufficient generality to claim applicability in those practices which such theory is attempting to defend the autonomy of criminal law against. However, the generality of these doctrines also inhibits their defence of the autonomy of the criminal law. The claim that these doctrines operate in isolation of considerations

arising from the substance of the offence effectively removes these substantive considerations from the reach of whatever normative aims may underlie criminal law theory's analysis. Such a limitation seems to be underpinned by a view of criminal law's positivist foundations, in which the fact that an interest is protected by a measure positively enacted by an authoritative source is sufficient to endow it with legal status regardless of other substantive considerations. This precisely replicates the view of criminal law's foundations underlying the regulatory function of modern criminal law, where emphasis is placed upon realising social goals over a concern for individual justice is justified on the basis of the measure directing the former having been positively enacted by an authoritative institution. We can see, therefore, that the type of individualism posited in isolation of the community informing the general doctrines of criminal law theory implies a positivist conception of criminal law which, rather than defending the autonomy of the criminal law against instrumentalisation, in fact appears to replicate and endorse the view of criminal legal practices underlying such a process.

On the other hand, the type of individualism emphasising the role of the community in recognising the moral status of the individual is perceived to be equally necessary to defending the autonomy of the criminal law, as it presents criminal law as having moral foundations and so invests the courts with the authority to evaluate those practices associated with modern criminal law's regulatory function for their compliance with core values. However, this appeal to the moral foundation of criminal law also seemingly inhibits criminal law theory's defence of its autonomy. This communitarian individualism presents a vision of the moral foundations of criminal law by emphasising the sense in which harms to individualist values are manifest to the community, suggesting wide-spread agreement amongst the community as to the basic identity of those values and that their protection is an important function of criminal law. This view therefore envisions an active role for the community in criminal legal practices. Individualist values are protected in criminal law by incorporating into judgments of responsibility the jury's moral evaluation of the defendant's conduct in light of the importance to individual personality of the particular interest harmed. The line between individual and social is therefore somewhat blurred as the moral worth of the individual is not recognised in abstraction or isolation from the community, but

as a social interest of the community itself. The corollary of this view of how criminal legal practices protect individualist values is that it implicitly denies, or at least limits, the general applicability of rules and doctrines, insofar as this relies upon a form of abstract definition which would take moral judgment out of the hands of the jury. This is noted by Farmer himself in relation to the reluctance in Scots law to reduce the *mens rea* requirement in murder to technical definition.

Although the communitarian individualism of criminal law theory is presented by Farmer and Lacey as defending the autonomy of the criminal law, its characterisation of individualistic values as a social interest in combination with the denial that such values can be defined and protected by doctrines of general application appear to produce a view of criminal law replicating the normative foundations upon which the regulatory function of modern criminal law is justified. Criminal legal practices are presented as guided by the attainment of social goals, whilst the normative force of doctrines claiming validity independently of particular substantive provisions are denied. The view of criminal legal practices underpinning communitarian individualism and regulatory criminal law ultimately appear to collapse into each other. Whilst the communitarian individualism identified in criminal law theory may present the criminal law as having a moral foundation and so invests the courts with authority to supervise all aspects of its practice, by identifying this moral foundation ultimately with the judgment of the community it replicates the normative foundation of modern criminal law's regulatory function of attaining social goals. It is difficult as a consequence to conceive how criminal law theory informed by communitarian individualism could act to defend the autonomy of the criminal law against such regulatory practices.

5. Conclusion

Whilst the analysis conducted in this chapter is aimed at highlighting potential limitations within the perspectives on the abstract individual identified in the prevailing literature, it also brings forward key themes which will structure the historical analysis conducted in the rest of the thesis. On the one hand, from Norrie and Ramsay's argument we see how the emergence of the abstract individual is associated with the increasingly important function performed by positive law in identifying interests which were to be protected by the criminal law. Both show how the emergence of the abstract individual in modern criminal law formed part a process of differentiating judgments of responsibility in criminal law from the moral judgement of the community. Doctrines of responsibility became technical discourses which ceased to explicitly draw upon shared norms for their normative force. On the other hand, from Ramsay and Lacey's argument we see the connection between the emergence of the abstract individual and more general transformations in the criminal law as it was increasingly employed as a tool by the administrative state in the task of securing and maintaining social order. Against this background, both envision the individualism of modern doctrine and theory as part of a defence of the criminal law's autonomy against the instrumentalisation of its practices insofar as it invokes a vision of the common law origins of the criminal law and its foundation in the life of the community.

However, as we have seen, there are tensions in these accounts of the abstract individual which may in turn indicate more general limitations in the historical analysis lying behind them. In particular, each perspective can be seen to fail to fully capture the normative force of the abstract individual. In relation to Norrie and Ramsay's argument, whereas the ideological character they attribute to concepts of responsibility suggests that their claim to legitimise practices is linked to an exclusion of substantive considerations concerning the nature of the interests protected from informing the judgement eventually reached, it was shown that understanding the normative force of these concepts seemingly necessitates some recognition of the existence of conflicts over the value attributed to such interests and the role of positive law in determining such conflicts. This suggests that although the emergence of the abstract individual may indeed be associated with the increasingly important function performed by positive law, the view that the abstract

individual operates to 'mask' this function may be misguided. In relation to Farmer and Lacey on the other hand, whilst their argument that the abstract individual is part of a strategy of defending the autonomy of the criminal law against its instrumentalisation is premised on the idea that it invokes a vision of the moral foundations of criminal law enabling the courts to supervise such instrumental practices, it was shown that locating the normative force of such individualist values in their recognition as being a part of the moral life of the community arguably replicates the normative foundations of those instrumental practices, with the result that it is difficult to see how principles and doctrines informed by such values could work as part of such a defence. Whilst exploring the common law origins of the abstract individual, and therefore the manner in which it may invoke a vision of criminal law as rooted in the community, may be an important part of understanding its nature in the context of a system of modern criminal law dominated by instrumental practices, the argument that it differentiates between practices on the basis of their foundation in moral values or positive law may also be misguided.

In turning our attention towards how the rest of the thesis explores the problem defined by this chapter, some comment should be made concerning the interpretive framework employed in the analysis of the historical materials that follows and upon which the argument concerning the nature of the abstract individual of modern criminal law is built. As will be seen, the interpretive framework employed in the thesis draws heavily on the historical and theoretical work of George P Fletcher, and in particular the concepts of manifest and subjective criminality he develops in *Rethinking Criminal Law*.¹¹³ Fletcher argues that certain of the most important and significant historical developments in the law of offences such as larceny, treason and other related offences and doctrines such as attempt liability can be viewed as the result of the varying degrees of influence these two patterns of criminality have held over the law at different periods of time. Moreover, he argues that a thorough understanding of these concepts and how they inform the internal development of criminal law doctrine can enable us to better understand the logic behind

¹¹³ George P. Fletcher, *Rethinking Criminal Law*, New Ed edition (Oxford ; New York: OUP USA, 2000).

some of the complexities which have afflicted the criminal law and which continue to do so in the present day.

At the core of manifest criminality is the idea that “the commission of the crime be objectively discernible at the time that it occurs...that a neutral third-party observer could recognise the activity as criminal even if he had no special knowledge about the offender’s intention.”¹¹⁴ This idea of manifest criminality evident in certain offences in turn reflects a particular view on the nature of crime and subsequently of the criminal law itself, as crime is perceived as a phenomenon which “crystallises as the product of community experience, rather than being imposed on the community by an act of legislative will.”¹¹⁵ The question of intent occupies a subsidiary position in the pattern of manifest criminality “primarily as a challenge to the authenticity of appearances, rather than as a basis for inculcating the actor”, and where intent does come into question it is “linked conceptually to the commission of certain acts.”¹¹⁶ On the other hand, at the core of criminal conduct envisioned by the pattern of subjective criminality is “the intention to violate a legally protected interest.”¹¹⁷ In contrast to the pattern of manifest criminality which necessarily requires a criminal act to signal the dangerousness of the actor to the community, in the pattern of subjective criminality the function of the criminal act is merely to “demonstrate the firmness rather than the content of the actors intent”, for where there may not be any such act “there are other acceptable means of proving intent, such as confessions, admissions against interest and evidence of prior as well as subsequent conduct.”¹¹⁸ The pattern of subjective criminality eschews the conceptual link between act and intent premised by the pattern of manifest criminality, treating intent as a “dimension of experience totally distinct from external behaviour” and “an event of consciousness, known to the person with the intent but not to others.”¹¹⁹ As with manifest criminality, the pattern of subjective criminality also reflects a view on the nature of crime and criminality, in particular that criminal law “should begin...by identifying the interests that are worthy of

¹¹⁴ Ibid., 115–116.

¹¹⁵ Ibid., 116.

¹¹⁶ Ibid., 117.

¹¹⁷ Ibid., 118.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

protection” and then go about “preventing conduct that threatens those interests” by criminalising those who intend to threaten those interests or take risks that subject the protected interests to danger.¹²⁰

This conceptual framework comprised of manifest and subjective criminality provides a useful foundation upon which to develop an account of the emergence of the abstract individual in English criminal law. Naturally the figure of the abstract individual is most prominent in the pattern of subjective criminality insofar as criminality is determined by proof that the individual intended to engage in criminal conduct and not upon the community’s perception of the criminality of their conduct. These concepts therefore offer a useful framework with which to analyse and interpret legal and historical material in order to identify trends towards recognition of the abstract individual in the criminal law. However, the argument developed in the thesis also aims to develop upon this framework and in some senses move beyond it by locating its concepts within a specific historical context through which it is hoped a more detailed picture of the sense of criminality expressed by the criminal law can be revealed, specifically the notion of the ‘lawless spirit’. However, with Fletcher’s proviso in mind that we must “be careful about reifying these patterns and treating them as though they possess a reality beyond the data they explain,”¹²¹ it may at this point suffice to merely gesture towards certain inconsistencies or uncertainties internal to both of Fletcher’s concepts. As we have seen, in relation to manifest criminality Fletcher indicates that ideas of intent may have a role to play within this pattern of criminality insofar as it may challenge the authenticity of appearances. However, beyond the negative proposition that intent does not form a basis for inculcating the actor, the precise scope of the role intent plays within this pattern of criminality is given little definition. That intent does not form a basis for inculcating the actor in the pattern of manifest criminality may suggest that its role is negligible and can conceivably be entirely absent. However, Fletcher also asserts a conceptual link between intent and criminal acts, suggesting that the matter of the actor’s intent is not only contingently engaged within the pattern of manifest criminality but necessarily so, albeit not as a formally distinct criteria for

¹²⁰ Ibid., 118–119.

¹²¹ Ibid., 121.

the attribution of liability. Such uncertainty over the role of the actor's intent within the pattern of manifest criminality seems to invite further analysis in order to refine the explanatory power of the concept. Evidence is also present of uncertainties in the concept of subjective criminality as put forward by Fletcher, albeit this time concerning the role of the criminal act. In particular, in attempting to account for the fact that even within those offences where the pattern of subjective criminality is most influential and the last vestiges of manifest criminality appear to have been swept away, the courts and legislature have consistently been demonstrably reticent to eliminate the requirement for a criminal act. As we have seen, Fletcher conceives the role of criminal acts within the pattern of subjective criminality as evidence of the firmness of the actor's intent rather than its content. However, no account is given of the precise role that evidence of the firmness of the actor's intent plays within the pattern of subjective criminality, nor the importance of different degrees of firmness which may be evidenced by criminal acts at different degrees remoteness from violating the interest protected by the law. Again, such uncertainties appear to adversely affect the power of the concept of subjective criminality to explain the current state of the law of certain offences and patterns of development within it. Fletcher himself appears to acknowledge these apparent limitations in the explanatory power of the concepts he develops when he comments in relation to offences criminalising manifestly dangerous conduct "it may be impossible to determine whether the fact fulfils a substantive requirement or whether functions merely as evidence of intent."¹²²

Fletcher intends the patterns of manifest and subjective criminality to function as analytical concepts, claiming their value lies in their capacity to "bring order to the dispersed data of the criminal law and help us to see the underlying unity in a wide array of disputes about doctrinal rules."¹²³ However, it appears that uncertainties persist at the margins of these concepts which threaten to undermine their explanatory power. Although it is appreciated that as analytical concepts they are meant to perform a specific function of illuminating the underlying rationale of criminal law doctrine, and as such should not be judged on their ability illuminate the nature of the relationship between criminal law

¹²² Ibid., 119.

¹²³ Ibid., 121.

doctrine and the wider social and political context within which the criminal law operates, I would also submit that the explanatory power of these analytical concepts could be further refined by attempting to locate them within a specific historical context sensitive to these wider dynamics. It will be recalled that Fletcher associates both manifest and subjective criminality with particular theories concerning the nature of criminal law. Broadly speaking manifest criminality is associated with a theory which identifies the community as the primary source of criminal law, whereas subjective criminality is associated with a theory identifying positive enactments as its primary source. Whilst both of these theories may figure in Fletcher's framework only as ideal types, it is a central contention of this thesis that the concept of criminality which is specific to modern criminal law cannot be articulated within a framework which imposes such a strong distinction between community and state as the source of criminal law. In particular, the sense of the abstract individual as a central figure of modern criminal law cannot be articulated through this framework. It would be fair to characterise the argument developed in the rest of this thesis as an attempt to justify this claim, locating the emergence of the abstract individual in modern criminal law at the point in its historical development where the community as ordered, regulated and defined by state came to be viewed as the primary source of criminal law and integral to an understanding of its nature. Moreover, the concept of the 'lawless spirit' the thesis develops in order to illuminate the type of criminality specific to this phase in the historical development of the criminal law can be viewed as sitting at the point where the concepts of manifest and subjective criminality meet – a sense of criminality drawing upon the perception of the community of the dangerousness of the actor as manifested by evidence of his or her disregard for the general and abstract rules giving the order of that community shape and definition. The lawless spirit therefore draws from both the patterns of manifest and subjective criminality whilst being reducible to neither. Whilst the concept of the lawless spirit draws upon Fletcher's concepts of manifest and subjective criminality, the historical method through which it is developed is also an attempt to explain their uncertainties and perhaps to move beyond them.

With regards to structuring the historical analysis conducted in the rest of the thesis, it can be seen that the prevailing literature provides us two important themes: the

increasing importance of positive law in the practice of criminal law on the one hand, and the relationship between criminal law and community as envisioned in the common law tradition on the other. However, whilst the prevailing literature tends to posit these themes against each other, the tensions highlighted in their arguments by the critical analysis conducted in this chapter indicates that such a view may be inhibitive. On the one hand, the fact that orthodox subjectivist doctrine in practice does not appear to exclude substantive considerations in the manner which Norrie and Ramsay's argument concerning their ideological character envisions suggests that their normative force may in fact be premised upon a more open recognition of the function performed by positive law in the community in relation to identifying interests for protection. On the other hand, the fact that the abstract individual's invocation of the common law origins of criminal law does not appear to differentiate between practices according to their normative foundation in moral values or positive law suggest that the basis upon which the principles and doctrines informed by it claim general normative force must speak more directly how the life of the community increasingly comes to be ordered by positive law and its instrumental practices, rather than seeking to marginalise or exclude them. As will be seen, not only does the interaction between community and positive law structure the historical analysis conducted in the rest of the thesis, but it is argued that the abstract individual is forged precisely at the point where the two meet in the order of modern criminal law.

CHAPTER TWO

THE TREASON TRIALS ACT 1696: THE ABSTRACT INDIVIDUAL AND THE MAKING OF LEGAL ORDER

1. Introduction

The decision to start our inquiry into the origins of the abstract individual in modern criminal law with an analysis of a statute from the end of the seventeenth century may appear unusual. The immediate reaction could be to question what such analysis could usefully tell us about a type of individualism which arguably did not consolidate itself in English criminal law until nearly two-and-a-half centuries later with the publication of Williams' *The General Part*. Upon further reflection, however, the 1696 Act is arguably the natural place to start the type of historical analysis which will be developed in this thesis. As we saw in Chapter One, amongst those scholars who have taken up the task of developing an historical analysis of modern criminal law's individualism, although there may be a significant difference in views as to the extent to which individual justice operates as a

concern in practices and how it relates to other functions in the criminal law, all essentially identify it in some sense with the question of legitimacy and securing values. Moreover, it was suggested there that this association between individualism and legitimacy suffers from certain limitations in developing an historical analysis, and as such may inhibit exploring other dimensions of abstract thought about the person in criminal law. With this in mind, the 1696 Act could be seen as an essential part of any historical account of modern criminal law's individualism. Although the Act's scope of application may have been narrow, applying only to trials for treason, by enshrining certain procedural rights – in particular the right to defence counsel and access to a copy of the indictment – it could be interpreted as the first embryonic manifestation in English criminal law of an image of the individual as possessing inherent moral worth and as such to be afforded a degree of protection from the state and, perhaps also, the community. As will be seen in the next section, other scholars who have analysed the Act have in fact adopted this interpretation, albeit they have not incorporated this analysis into the type of more general, socio-theoretic inquiry into modern criminal law explored in Chapter One and which this thesis also seeks to develop.

Having established what the value of looking at the Treason Trial Act 1696 may be for the historical analysis of modern criminal law's individualism more generally, it remains to specify the importance it holds for the argument developed in this thesis more specifically. On the one hand, the focus in the prevailing literature upon Lockean-style individualism influential during the period under consideration as an impetus behind the procedural reforms introduced by the 1696 Act provides a good opportunity to illustrate in further detail the suggestion made in Chapter One that interpreting the impact of individualism upon modern criminal in terms of it legitimising its practices suffers from important limitations. It is in this light that the fourth section in this chapter analyses the claim made in the prevailing literature that the procedural rights granted to the accused by the 1696 Act were informed by a perceived need to protect the individual against the state reflected in the Lockean principle of self-defence. It is argued against this that the Lockean-style of seventeenth century individualism cannot in fact be read to entail such radical consequences for the practice of treason trials or the criminal law more generally, suggesting that its impact would in fact be much more conservative than has been

envisioned by other scholars. Despite this, however, the argument holds back from denying that there could be any possible connection between Lockean individualism and the reforms introduced by the 1696 Act, a theme which is picked up again in Chapter Three.

On the other hand, and on a more constructive note, analysis of the 1696 Act also provides an opportunity to develop the argument made in this thesis concerning the origins of the abstract individual in modern criminal law. The offence of high treason presents itself as an area of interest when exploring the origins of abstract thought about the person in criminal law. Along with homicide and larceny, it is in relation to high treason that Coke invokes the principle *et actus non facit reum, nisi mens sit rea*, arguably the first explicit acknowledgement of the *mens rea* doctrine that would eventually be at the heart of the individualist theory and doctrine of modern criminal law.¹²⁴ In Section 3 an analysis is conducted of the law of treason forming the legal basis of the seventeenth-century treason trial. In particular, the influence of the doctrine of constructive treason is outlined, arguing that this doctrine was informed by a concept of treason which, in conceiving of treason as a crime against the state, contrasted with traditional concepts of treason as a breach of duty owed to the person of the king. The chapter then moves on to analyse the treason trials themselves, identifying as a key feature of these trials a constant challenge to received understandings of the distinction between fact and law which structured the traditional treason trial and formed the basis for denying counsel to defendants on matters of fact. The chapter then returns to the law of treason, analysing in greater detail how the doctrine of constructive treason shaped interpretations of the law given by Coke, Kelyng and Hale, arguing not only that it was in Hale's interpretation we see the rationale behind the doctrine of constructive treason applied in the most consistent manner, but corresponding with this was a sense of criminal mind. Moreover, it is shown how this sense of the criminal mind occupied a point at the juncture of the distinction between fact and law which was inconsistent with and undermined the distinction as traditionally understood and which structured the traditional treason trial. The final section demonstrates how the criminal mind identified with the doctrine of constructive treason challenged the traditional

¹²⁴ Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* (London: Printed for E. and R. Brooke, 1797), 6.

distinction between fact and law through an analysis of commentaries on one of the most notorious treason trials of the period which was often cited as compelling evidence of the need for reform. We turn first to a summary of the Act itself, the circumstances surrounding its enactment, and the prevailing literature on its causes.

2. The Treason Trials Act 1696: Politics, Violence and the Trial

The Treason Trials Act 1696 marks an important moment in the history of the criminal trial in England.¹²⁵ The Act enshrined a series of procedural safeguards in favour of the accused, introducing in embryonic form the criminal trial as we recognise it today. The most noteworthy provisions were those granting the accused the right to defence counsel during the trial and a copy of the indictment. Both of these provisions stood in stark opposition to traditional practice in felony trials. Assistance in the form of granting procedural rights to the accused had long been resisted on the basis that they would obstruct the discovery of the true facts. For the courts the accused's guilt or innocence was manifest in their responses to questioning and their behaviour throughout the trial. Moreover, the courts believed that by unmediated interaction with the accused they could give a true assessment of their character and determine the appropriate sentence, or if necessary recommend the convicted for pardoning. Against this background, for the accused to be represented by defence counsel was perceived to be an 'artificial cavil', disturbing the tried-and-tested principles according to which the trial fulfilled its purpose and potentially allowing the guilty to escape justice by bewildering juries through tricks and performances.

The immediate origins of the Act lie in the tumultuous political climate under the late-Stuart reigns of Charles II and James II up until the Glorious Revolution of 1688. This period is marked by successive attempts to quell opposition to the regime through the

¹²⁵ 7 & 8 Will III c 3, 1696.

courts, bringing indictments for high treason against influential political figures, often with evidence collected through individuals hired to ‘trepan’ the accused into treasonous activity or perjured testimony, relying on the strength of public hysteria surrounding real or alleged plots against the king and pressure exerted against the bench for successful prosecution. The complexities of late-seventeenth century English politics ensured not just one faction bore the brunt of persecution. Whigs, Tories, Catholics and Protestants of various denominations found themselves the victims of trumped up treason charges at some point, with conspiracy and counter-conspiracy being made in each direction. Treason trials were therefore a central part of political life during this period.

Although these experiences under the late-Stuarts, and their continuation after the Glorious Revolution obviously informed the immediate causes of the 1696 Act’s passing, the prevailing literature highlights how this experience alone forms an inadequate explanation of the Act. First, shaky treason prosecutions had long been a central feature of English political life without any impetus for radical reform of its prosecution in the courts necessarily following. It is in this light that Phifer emphasises how in the period leading up to the 1696 Act *all* political factions had either suffered persecution through treason accusations or had lived under the constant threat of it, rather than just one group. The political class, informed by the collective memory of the danger and insecurity surrounding English politics in recent experience, passed the 1696 Act to “release them from those fears.”¹²⁶ Shapiro focuses instead upon the political principles at stake during the recent conflicts. In contrast to previous periods, accompanying the Whig victory was a new “political world view” that recognised the political and moral worth of the individual and was more amenable to the protection of their rights as against the state.¹²⁷ This, for Shapiro, was what made the criticism and reform of the treason trial possible in a manner that was not in previous eras.

¹²⁶ James R. Phifer, “Law, Politics, and Violence: The Treason Trials Act of 1696,” *Albion: A Quarterly Journal Concerned with British Studies* 12, no. 3 (October 1, 1980): 256.

¹²⁷ Alexander H. Shapiro, “Political Theory and the Growth of Defensive Safeguards in Criminal Procedure: The Origins of the Treason Trials Act of 1696,” *Law and History Review* 11, no. 02 (1993): 219.

The 1696 Act's specifically legal significance is another reason to resist characterising its origins purely in preceding political events. Reducing the Act's origins to the immediate political context may be to risk overlooking important dynamics operating more generally in the law during this period. On the one hand the Act drew upon developments that had long already been occurring in the law. Rezneck, citing the increasing tendency of judges to exercise their discretion to grant the accused procedural safeguards, comments that "[i]n the last analysis [the 1696 Act's] roots are in the subtle currents of opinion and legal practice which arose and grew in volume as the seventeenth century progressed."¹²⁸ Given these changing practices were developing slowly through the courts relatively independently of the partisanship of political life, to reduce the origins of the 1696 Act to the latter would overlook an important dynamic behind the substance of its reforms.

On the other hand the Act did not come into being in isolation from other legal developments, but was the embryonic origins of a transformation to occur throughout legal practice that eventually made the adversarial system standard in criminal trials. Rezneck for example describes the Act as "the fountain-head of the modern movement for the regularisation and humanisation of judicial procedure."¹²⁹ Langbein in particular tries to draw more systematic links between the 1696 Act and the eventual consolidation of adversarial procedure in the criminal courts. He emphasises how the enshrining of procedural safeguards for the treason defendant was the beginning of a wider trend of 'evening up' in criminal procedure, informed by a growing awareness of the distorting effect on the trial's 'truth-seeking' function imposed by the imbalance of power between the helpless defendant and the prosecution lawyers backed by the resources and influence of the government.¹³⁰ The 1696 Act acted as a model to follow when a similar imbalance emerged in the standard felony trial in the eighteenth century as a consequence of the increasing tendency of prosecution to be undertaken by the state rather than private citizens.

¹²⁸ Samuel Rezneck, "The Statute of 1696: A Pioneer Measure in the Reform of Judicial Procedure in England," *The Journal of Modern History* 2, no. 1 (March 1, 1930): 7.

¹²⁹ *Ibid.*, 6.

¹³⁰ John H Langbein, *The Origins of Adversary Criminal Trial* (Oxford; New York: Oxford University Press, 2005), 97–102.

The argument made in this chapter builds on the limitations of these prevailing accounts. Explanations of the origins of the 1696 Act relying upon the pragmatic and principled motivations of the political elite given by Phifer and Shapiro respectively are limited by their failure to properly explore the legal origins of the Act. Both shift between seeing the courts as a political weapon deployed by competing factions on the one hand or an unprincipled collection of practices at the mercy of judicial whim on the other. Shapiro dismisses the possibility that the body of legal thought developed in the common law courts over centuries could have given a principled basis for reform of the treason trial on the basis of a fundamental mischaracterisation, characterising it as the “preservation of the inherited wisdom of the past”¹³¹ and summarising the move to individualism and away from common law as a move giving defendants “all that reason could provide, not merely what history had accorded them.”¹³² Phifer’s analysis of the role of the common law is also brief, finding behind the developments in treason trial procedure throughout the seventeenth century cited by Rezneck mere “practical and humanitarian reasons”.¹³³ This chapter will illustrate how these arguments overlook the influence of the common law on the 1696 reforms.

3. The Doctrine of Constructive Treason

With this in mind, the account of the origins of the Treason Trials Act 1696 presented in this chapter places particular emphasis on developments within the law of treason itself. It will be seen that by the seventeenth century ‘compassing or imagining the death of the king’ emerged as the primary offence in the law of high treason, enabled in part by an interpretation of its scope which came to be known as the doctrine of constructive treason. The main argument of the chapter is premised upon highlighting the influence this doctrine had upon treason trials throughout the seventeenth century up until the passing of the Act. In particular it will be argued that this doctrine drew upon a concept of treason viewing it as

¹³¹ Shapiro, “Political Theory and the Growth of Defensive Safeguards in Criminal Procedure,” 251.

¹³² *Ibid.*, 240.

¹³³ Phifer, “Law, Politics, and Violence,” 238.

a crime against the state rather than the breach of a duty owed to the person of the king, transforming in turn the notion of the 'treasonous mind' at the core of the offence and how it was to be proven before the court. The doctrine of constructive treason and the concept of treason which informed it therefore give vital meaning and context to the challenges to the distinction between matters of fact and matters of law structuring the traditional model of the treason trial, illustrated in Section 5, and which led to its eventual reform.

Of the different branches of high treason recognised in English law during the late-medieval and early modern periods, it is perhaps compassing or imagining the death of the king which in its historical development most prominently reflects the general transformation undergone by the concept of treason from the fourteenth century when the offence was initially declared by the Treason Act 1351 up to the seventeenth century with which this chapter is primarily concerned. In terms of the law itself, the main feature of the transformation of the offence with which we are concerned was its extension to reach not only threats against the actual life of the king but also threats to his authority. That this was a settled part of the law by the early seventeenth-century is reflected in Coke's writing on the offence. Coke stated that overt-acts declaring an intention to "depose the king, or take the king by force, and strong hand, and to imprison him until he hath yielded to certaine demands" were sufficient to prove a compassing or imagining the death of the king as they "make the king a subject, and to dispoyle him of his kingly office of royall government"¹³⁴, a view which Hale approvingly cited, albeit adding that "there must be an overt-act to prove that conspiracy to restrain the king, and then that overt-act to prove such a design is an overt-act to prove the compassing the death of the king."¹³⁵

The view that 'death of the king' included threats to the authority of the king recorded by Coke and Hale reflected a shared understanding and acceptance amongst judges and other legal and political actors of the doctrine of constructive treason, whereby the courts had constructively interpreted the language of the original offence as enacted in

¹³⁴ Coke, *The Third Part of the Institutes of the Laws of England*, 11.

¹³⁵ Matthew Hale, *The History of the Pleas of the Crown*, vol. 1 (London: E. and R. Nutt and R. Gosling, 1736), 109.

the 1351 Act in order to extend its reach. The earliest decisions expressly authorising the doctrine appear to be that of the Earl of Essex in 1600 and Lord Cobham in the reign of James I, relied upon by Coke and Hale, although there is evidence that during Elizabeth I's reign the doctrine was considered to be supported by sufficient legal authority to be relied upon in the drafting of treason statutes.¹³⁶ This is not to say that constructive interpretations had not been relied upon as the basis for judicial decisions and supplementary enactments before this period. The prosecution of political enemies for high treason was too powerful and convenient a weapon in a monarch's arsenal for strict, literal readings of the 1351 statute to consistently prevail against more liberal interpretations. Already before the end of the fourteenth century the offence of compassing and imagining the death of the king declared by the statute of Edward III formed the basis for extending by legislative enactment the law of high treason to make guilty he that "compasseth or purposeth the death of the king, or to depose him, or to render up his homage or liege, or he that riseth against the king to make war within his realm".¹³⁷ Moreover, a decision from 1402 appears to show that the connection between intending to depose the king and intending his death was already being made in the courts.¹³⁸ In this case the accused was charged with publicly declaring Richard II to still be alive and asserting his claim to the throne to be superior to that of the reigning monarch Henry IV. In deciding that these words contained treason it was held, possibly upon the personal intervention of the king,¹³⁹ that the crime consisted in the intent to excite the people against their king with the aim that he be deposed, which, in the opinion of the court, rather than itself constituting a novel treason, was in effect one and the same as intending to kill the king and his lords.

Despite such evidence that a wider interpretation of the death of the king was already being entertained in the period immediately following the 1351 Act, it is doubtful whether it had yet formed the basis for a definite body of legal doctrine as it was to do so in

¹³⁶ James Fitzjames Stephen, *A History of the Criminal Law of England*, vol. II (London: Macmillan, 1883), 265.

¹³⁷ *21 Rich II c 3*, 1397.

¹³⁸ J. G. Bellamy, *The Law of Treason in England in the Later Middle Ages* (Cambridge: Cambridge University Press, 1970), 116–118; For the status of words as treason under the 1351 Act and at common law, see Isobel D. Thornley, "Treason by Words in the Fifteenth Century," *The English Historical Review* 32, no. 128 (1917): 556–61; Samuel Rezneck, "Constructive Treason by Words in the Fifteenth Century," *The American Historical Review* 33, no. 3 (1928): 544–52.

¹³⁹ Bellamy, *The Law of Treason in England in the Later Middle Ages*, 117.

the seventeenth century.¹⁴⁰ With treason prosecutions during this period largely functioning as a means through which the king dealt with political enemies, the act of attainder proved a more convenient means of securing convictions due to the greater responsiveness of the process to immediate political considerations.¹⁴¹ As such there was neither the political need nor the opportunity for an expansive interpretation of compassing or imagining the death of the king to be developed through the consistent practice of the courts and attain the status of an established legal doctrine such as that which would later be reported by Coke and Hale.

The conditions for the development of the doctrine of constructive treason were firmly laid during the reigns of Henry VIII and his Tudor and Stuart successors. The break from Rome initiated by the Reformation created new problems as the king sought to assert political and religious supremacy over the pope and intensified threats to his person and authority from the significant constituency of subjects who continued to maintain allegiance to the previous order.¹⁴² The law of treason being considered a vital part of the armoury through which this political and religious revolution was to be consolidated and secured, the treason statute of Edward III, especially on a narrow, literal reading, was perceived to be too limited in scope to meet these new challenges. As such, a considerable number of new treasons and cognate offences were introduced by legislative enactment, aimed squarely at meeting these new challenges and expanding the law of treason considerably. In contrast to the treasons declared by the 1351 Act which aimed primarily at securing the king's person, these new offences had explicitly political objectives, for example suppressing the power and influence of the Catholic Church, securing the line of succession which the king had established, and suppressing widespread public disorder or forms of political agitation

¹⁴⁰ W. S. Holdsworth, *A History of English Law*, vol. VIII (London: Methuen & Co., 1925), 309.

¹⁴¹ W. S. Holdsworth, *A History of English Law*, 3rd ed., vol. III (London: Methuen & Co., 1923), 292.

¹⁴² G. R. Elton, "The Law of Treason in the Early Reformation," *The Historical Journal* 11, no. 2 (1968): 211–36; G. R. Elton, *Policy and Police: The Enforcement of the Reformation in the Age of Thomas Cromwell* (Cambridge: Cambridge University Press, 1985), chap. 6 and 7; Isobel D. Thornley, "The Treason Legislation of Henry VIII (1531-1534)," *Transactions of the Royal Historical Society* 11 (1917): 87–123; D. Alan Orr, *Treason and the State: Law, Politics and Ideology in the English Civil War* (Cambridge: Cambridge University Press, 2002), chap. 1; On reform of the state under Henry VIII generally, see G. R. Elton, *Tudor Revolution in Government: Administrative Changes in the Reign of Henry VIII* (Cambridge: Cambridge University Press, 1953).

which were considered to lead to such disorder.¹⁴³ Despite many of the enactments creating new treasons being temporary, and a pattern of monarchs repealing the treason statutes of their immediate predecessor upon taking the throne, many were subsequently re-enacted or added to, with the result that the Edward III statute rarely stood as the sole treason statute for a prolonged period of time.

The Tudor and early Stuart monarchs may have relied upon legislative enactment rather than constructive interpretations of the 1351 Act to expand the scope of the law of treason, but in doing so they laid the foundation for the judicial development of the doctrine of constructive treason at the turn of the seventeenth century. Despite the treasons created by the Tudor monarchs being repealed by the end of this period, the 1351 Act again being reverted to as the sole legal foundation of high treason, the explicit object of these treasons in securing not only the physical person of the king against attempts on his life or the threat of violent conflict which would obviously threaten his life, but more generally the exercise of those prerogative powers invested in the king and his office by the constitution, introduced a new interest into the law of treason which would exert a permanent influence upon its development. As Holdsworth has commented, by Elizabeth's reign the connection between the security of the monarch and the security of the state had become generally accepted as the conceptual basis of the law of treason and its justification; "the modern territorial state was now well established" and it was "coming to be generally recognised that allegiance to the state ought to override all other ties" and that "possibly the existence of the English state, and certainly its orderly development, were bound up with her safety, led the nation to acquiesce in any measure that could be devised to preserve it."¹⁴⁴

The doctrine of constructive treason was one of the most prominent expressions of this new interest in the security of the state exerting permanent influence in the law of

¹⁴³ J. G. Bellamy, *The Tudor Law of Treason* (London: Routledge, 1979), chap. 1 and 2; Stephen, *A History of the Criminal Law of England*, II:255–263; Orr, *Treason and the State*, chap. 1.

¹⁴⁴ Holdsworth, *A History of English Law*, 1925, VIII:310.

treason. That protecting the state became a central interest in the law of treason in turn reflected changing conceptions of kingship which were firmly rooted by the time the doctrine of constructive treason emerged at the turn of the seventeenth century. This argument has been made by D. Alan Orr in *Treason and the State* which, although taking as its immediate subject how ideas about kingship, sovereignty and state shaped the interpretations of political action in the key treason trials of the English Civil War, puts forward an interpretive framework for this analysis relying upon an interesting and persuasive account of the political concepts informing the doctrine of constructive treason.¹⁴⁵ The main thrust of Orr's argument is that the ideas deployed in the context of key treason trials of the Civil War "show how political innovation sprang from simply the redeployment of pre-existing, commonplace political ideas" and that the events of the 1640s were "a revolution that received its justification, of necessity, within pre-existing conceptual horizons."¹⁴⁶ Despite the radically divergent nature of the political actions that different factions sought to legitimise or oppose, the ideas they drew upon in doing so were "familiar, commonplace, sometimes even disappointingly banal" as "[i]n order for them to have purchase with their intended audiences they were of necessity familiar and appealed to shared values and shared authorities."¹⁴⁷ The conflict was not therefore between the ideologies of absolutism and constitutionalism as put forward by the traditional 'Whiggish' view.¹⁴⁸ Instead, it was a conflict "over the precise practical definition of these rights and marks [of sovereignty]", a conflict which occurred "in spite of prevailing consensus that the king was a lawful king, that this king was sovereign, and that he exercised control over the marks and rights of sovereignty."¹⁴⁹

Orr's argument that conflicts over the definition of sovereignty which led to the Civil War were fought within a consensus concerning the location of sovereignty is in part built upon a reassessment of prevailing understandings of the nature of the kingly authority, not only of those who opposed the king but also of those in his support. That royalists engaged

¹⁴⁵ Orr, *Treason and the State*.

¹⁴⁶ Ibid., 210.

¹⁴⁷ Ibid., 5.

¹⁴⁸ J. P. Sommerville, *Royalists and Patriots: Politics and Ideology in England 1603-1640*, 2nd ed. (London; New York: Routledge, 2014).

¹⁴⁹ Orr, *Treason and the State*, 39.

in disagreement with those seeking to limit the king's power through the shared language of defining the marks of sovereignty reveals that even those who claimed near-absolute power for the king drew upon the conception of the king as head of state as the source of his authority. Orr puts forward the theory of the king's two bodies as the dominant idea of kingship during this period, but emphasises the influence of increasingly abstract conceptions of the state in shaping it, characterising it as an "important halfway house in the transition between personal monarchy and the emergence of the impersonal state."¹⁵⁰ Moreover, on this view the law "was essential in constituting the body of the king", "*fundamental*, not in the sense that it limited the actions of the monarch but in that it gave form and composition to the corporate polity of king and kingdom."¹⁵¹ Even within this 'supra-personal' conception of kingship which asserted the inseparability of the natural and political body of the king, the king was not therefore above the law but, if not 'under' it as such, then at least held power by virtue of it.

This interpretation of the theory of the king's two bodies is key to the argument of this chapter as it sheds light on the ideas which informed the doctrine of constructive treason and the conditions in which the position of that doctrine at the core of the law of treason was consolidated. For Orr, the theory that the king's two bodies "were distinguishable in politic and natural capacities yet indivisible" became "the foundation of constructive treason under English law: a crime against the king's realm such as subverting or interfering with the operation of his laws, the soul or sinews of his body politic, could be adjudged treasonable as a compassing of his *natural* body", enabling "the expansion of the law of treason to include such seemingly innocent actions as the encroachment of forensic jurisdiction."¹⁵² The doctrine of constructive treason was therefore a "necessary bridge between the idea of treason as a crime against the king's person and the notion of treason as a crime against the state."¹⁵³ Moreover, the doctrine of constructive treason was proof that the idea of treason as an offence against the state "was *not* unknown at the outbreak of the English Civil War but constituted part of a shared stock of commonplace political

¹⁵⁰ Ibid., 45.

¹⁵¹ Ibid., 46–47.

¹⁵² Ibid., 48–49.

¹⁵³ Ibid., 208.

concepts available to early Stuart jurists and politicians.”¹⁵⁴ Although the doctrine of constructive treason did not of course embody a fully impersonal concept of the state, relying as it did upon the political and natural body of the king being indistinguishable, on Orr’s interpretation it did reflect an increasingly abstract concept of kingship constituted by municipal law, in particular the common law, and of crimes against the authority of the king as crimes against the state.

The doctrine of constructive treason therefore embodied a concept of treason as the breach of a specifically political duty owed to the king by virtue of his position as head of state, making the ultimate interest protected by the offence that of the security of the state. This view had little explicit place in the ideas that informed the original enactment of the 1351 Act. On the contrary, the suggestion that the king held prerogative powers by virtue of occupying a particular position or office could itself be considered treasonable insofar as it drew a distinction between the natural and political capacities of the king. The ideas informing the original passing of the 1351 Act were more firmly rooted in a distinctly feudal concept of the political community and kingship in which the political body was held together by a network of personal bonds and obligations inhering to the life of the community, of which the king sat atop.¹⁵⁵ To openly view duties owed by subjects to their king as an aspect of a political obligation to maintain the authority of the state would be to distort the personal and organic nature of these duties. Moreover, to reduce the breach of duty to the king to a failure of a subject to fulfil his or her political obligation to the state would be to distort the sense of moral treacherousness expressed by a failure to perform the duties intrinsic to the personal relationship between subject and king.

The development of the doctrine of constructive treason extending the offence of compassing and imagining the death of the king can therefore be seen to be motivated by an acknowledgement of the centrality of the state to the public life of the community and

¹⁵⁴ Ibid., 31.

¹⁵⁵ Frederick Pollock and F. W. Maitland, *The History of English Law before the Time of Edward I*, 2nd ed., vol. II (Cambridge: Cambridge University Press, 1898), 526–531; Bellamy, *The Law of Treason in England in the Later Middle Ages*, chap. 1.

the need to punish conduct which undermined it. Whereas extensions of compassing and imagining the death of the king in the fourteenth and fifteenth centuries had been rooted in a view of such conduct as a breach of obligations owed by subjects to the person of the king, by the turn of the seventeenth century such extensions via the doctrine of constructive treason criminalising conduct threatening the king's exercise of his constitutional authority were grounded upon the view that such conduct entailed the breach of a duty founded upon the political obligation subjects held towards the state.

Insofar as the doctrine of constructive treason was at the core of the law of treason throughout the seventeenth century and as such formed the legal basis of treason trials during this period, drawing attention to the conditions in which these developments occurred forms the basis for another perspective on the developments highlighted by other authors in their accounts of the origins of the 1696 Act. That the doctrine reflected a concept of treason in which the offence was increasingly viewed as a crime against the state rather than purely the person of the king is particularly important insofar as it brings forward the extent to which prosecutions for treason took on a public character in the sense of being a crime against a public institution constituted by public laws, rather than an offence against the person of the king and his private interests. An important strand of Langbein's argument is that the move towards establishing balance between prosecution and defence in the courtroom was set against the breakdown of the traditional model of the trial informed by a paternalistic conception of the nature of the relationship between king and subject. The sense of the personal interest of the king would have been more focussed in treason prosecutions where the crime was considered to concern him directly. That the doctrine of constructive treason drew upon a concept of treason in which the personal concern of the king in the offence was, whilst by no means marginalised, at least balanced against the idea that treason was also crime against the state more abstractly conceived as a public institution, it is possible to see how the paternalistic principles justifying the traditional treason trial would have begun to lose purchase. The 'truth' that the trial sought to establish concerned harm to a public interest, so that proceedings directed towards establishing that truth marked by the personal influence of the king and the pursuit of his private concerns would have been increasingly difficult to rationalise and justify. Although

this context does not necessarily explain the specific principles Langbein identifies as informing reform of the treason trial, for the public interest in prosecuting treason is arguably compatible with a variety of different types of proceedings, it can certainly illuminate the context within which justifications of the traditional model of the treason trial broke down.

The context of the doctrine of constructive treason brought forward by Orr can also give meaning to certain of the developments highlighted by Shapiro. As we have seen, at the core of Shapiro's argument is that reform of the treason trial was based upon Whig principles informed by Lockean political individualism. Whilst an important component of the argument developed in this chapter is that Shapiro overstates the influence of this political individualism as a motivation for reform, discussed in detail in Section 3, insofar as such political individualism envisioned the state in abstract terms and emphasised the public nature of the laws by which it was constituted, the illumination of the concept of treason informing the doctrine of constructive treason enables us to locate the place of this political individualism in the reform of the treason trial with greater precision. Lockean political thought may have been influential in the reform of the treason trial, but not because its views on the right of individuals to defend themselves against the state necessarily had purchase upon the mind set of those who eventually pursued reform, but rather because of the abstract conception of the state this strand of political thought put forward tapped into a concept of treason which was already by that point well-established in the law, expressed in the doctrine of constructive treason, and constituted part of the shared understandings through which the boundaries of the offence were contested.

4. The Right to Self-Defence and Reform of the Treason Trial

This section challenges the argument put forward by Alexander Shapiro that the right to self-defence as articulated by opponents of the late-Stuart government formed the principled basis for the reform of treason trial procedure. It will be argued that although the right to self-defence may have been a powerful argument against absolutism and a justification of resistance, and although it could and indeed did generate criticism of the treason trials under the late-Stuarts as an example of such absolutism, by itself it did not form the basis for principled legal reform such as the Treason Trials Act 1696. Through an analysis of Locke's *Two Treatises* it will be demonstrated that Shapiro overstates the extent to which the right to self-defence as understood by late seventeenth century Whigs was capable of informing the reform of political and legal administration according to individualist principles, at least in the manner Shapiro envisions. However, although Locke's individualism did not translate into the 'individual versus state' framework for evaluating and reforming legal practice that Shapiro envisions, it did inform, or perhaps more accurately reflect, a belief in the social origins of political and legal authority which did inform the 1696 Act, an argument made in the rest of this chapter.

The right to self-defence and the Treason Trials Act 1696

Shapiro argues that the impetus behind the eventual reform of the treason trial in 1696 stemmed from the experience of radical Whigs under the recently deposed late Stuarts. He argues that treason prosecutions, often supported by suspect evidence, were used for explicitly political purpose, suppressing through terror and intimidation the doctrine of resistance popular amongst radical Whigs. But the influence of the Whigs extended beyond merely being an example of government repression exercised through the courts. The political thought of figures such as John Locke, Robert Ferguson and Algernon Sydney provided the principles according to which the treason trial was criticised and which informed its eventual reform in the 1696 Act.

Shapiro claims to distinguish his argument from other accounts by identifying the principles that informed the treason trials reform rather than presenting it as a pragmatic reaction to the excesses of the recent past, or the product of a compromise between political factions. For Shapiro, reform of the treason trial was part of a wider reimagining of the relationship between individual and state. The eventual Whig victory brought “a realignment of political priorities in favour of the citizen” and “in turn an appreciation of the defendant as an individual worthy of protection.”¹⁵⁶ Traditional deference to Crown authority and notions of public interest and security used to justify the heavy restrictions placed on the defendant in the treason trial were attacked using individualist principles. To those for whom public safety was “no more than the collective individual security of each citizen”, such an evident imbalance of power in the treason trial was more difficult to justify.¹⁵⁷

Shapiro places particular emphasis on the natural law principles of self-defence and self-preservation associated with the doctrine of resistance espoused by radical Whigs. His argument relies heavily on the political struggle in the country against the tyranny of the late-Stuarts acting as a “frame of reference” for the struggle between prosecution and the accused in the courtroom.¹⁵⁸ At its crux is the belief that the principles which informed and justified radical acts of political resistance against the late-Stuarts also informed the subsequent legal reform. Political resistance was “founded on a more fundamental principle of self-defence available to all individuals as a matter of natural law” and so was “accessible to the treason defendant alone.”¹⁵⁹ Where the treason trial was deemed “institutionally defective” the defendant, by natural law, “had every right to a vigorous self-defence in the face of injustice.”¹⁶⁰

¹⁵⁶ Shapiro, “Political Theory and the Growth of Defensive Safeguards in Criminal Procedure,” 255.

¹⁵⁷ *Ibid.*, 236.

¹⁵⁸ *Ibid.*, 238.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

Just as the evils of absolutism had been exposed and resisted in the name of the principle of self-defence, Shapiro argues that this principle also operated in the court room to highlight the dangers of traditional practices and enabled the trial to be rethought in a manner respecting individual right, an ambition fulfilled by the 1696 Act. As the 1688 settlement was meant to recognise 'the nation' as represented by Parliament as the foundation of government, when extended into the court room the principle of self-defence promoted the defendant's right to participate in a procedure where his or her life and liberty was at stake, recasting him or her "not as a passive recipient of a patriarchal monarch's justice but as an active redefiner of the meaning of that justice."¹⁶¹ Self-defence, as an expression of a wider individualist political and moral philosophy, translated into an inspiration for a programme of legal reform as much as a justification for political rebellion.

Self-defence and the individual

Although the right to self-defence, as part of the fundamental law of nature, is a central component of Locke's political philosophy, it is difficult to determine how it could be conceived to inform a principled reform of political and legal administration in the manner Shapiro suggests. This is not, however, to suggest that self-defence held no significance for ideas of political and legal authority. Locke conceived that the authority of positive law was clearly bound up with the law of nature, of which the right to self-defence accessible to all individuals was a component. Locke was clear to affirm that "the obligations of the law of nature cease not in society" but rather "stands as an eternal rule to all men".¹⁶² Natural law was "drawn closer" by positive law and its use of "known penalties...to enforce their obligation."¹⁶³ The ultimate standard by which all men's actions were to be judged, including the making of rules by legislators, was the law of nature. Positive laws were "only

¹⁶¹ Ibid., 240.

¹⁶² John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge Univ. Press, 1989), 357–358.

¹⁶³ Ibid., 358.

so far right, as they are founded on the law of nature, by which they are to be regulated and interpreted.”¹⁶⁴

But despite positive law’s foundation upon the universal and immutable law of nature, Locke does not identify the right to self-defence in the law of nature with any definite substantive content which can be seen to be ‘enshrined’ as such in positive law or not. On the contrary, the right to self-defence only comes into being in a state of war marked primarily by the absence of a common authority for identifying such interests. Locke cites a robbery as an example of a situation where the right to self-defence can be invoked.¹⁶⁵ Although the victim’s goods are of course vulnerable in the attack, for the purpose of triggering the right to self-defence Locke’s focus is not so much on the specific harm the defendant is at risk of suffering at the hands of the thief. Rather it is the practical limitation of law in the situation. After noting that he cannot by right harm the thief “but by appeal to the law” he goes on to qualify that “where [the law] cannot interpose to secure my life from present force” and “the aggressor allows not time to appeal to our common judge, nor the decision of the law” the law of nature permits him his own defence.¹⁶⁶ The right of self-defence here does not so much speak to the defence of particular identifiable interests, either by the law of nature or positive law, but that acting in self-defence is justified where the reach of positive law is temporarily restricted.

The existence of a state of war in which the right to self-defence can be invoked is not only triggered by the temporary limitation of the law, but can also involve more contestable evaluative questions. However, Locke again holds back from giving any concrete content to these matters. The roles of aggressor and victim in the conflict that marks the state of war are given little clarification. Locke claims “a right to destroy that which threatens me with destruction” on the basis that under the law of nature “the safety of the innocent is to be preferred” without indicating how, if at all, to identify the innocent

¹⁶⁴ Ibid., 275.

¹⁶⁵ Ibid., 280–281.

¹⁶⁶ Ibid., 280.

party in such a conflict.¹⁶⁷ The right to self-defence is invoked to allow the innocent a means of defence in the possibility of conflict with an aggressor. But indication as to when conflict can be said to come into being, who the innocent and guilty parties are in such a conflict, and what interests must be at risk and how they may be put at risk is not given. As evidenced by his use of thieves and housebreakers to illustrate the concept, Locke no doubt relied on the shared assumptions of his readership for day-to-day examples, no doubt of a broadly similar view as his concerning the sanctity of property, if not exactly the means that should be adopted to defend it, to answer these questions. However, within the overall structure of his political philosophy it is clear that it is the absence of a common judge to appeal to for determination of the conflict rather than that substance of the conflict itself that is the most important condition of the state of war and the subsequent invoking of the right to self-defence.

Self-defence and society

Whereas in Locke's conceptual state of nature determining the scope of the right of self-defence poses little interpretive difficulty as the lack of any identifiable common judge means it is in principle available wherever an individual perceives a threat, in the state of society the picture is complicated by the existence of political institutions which claim positive authority to determine any disputes. As such the existence of the state of war, the condition in which an individual can act upon the right to self-defence, is a much more complicated judgment involving evaluating political institutions claims to be a common authority.

In moving from the state of nature to the state of society the primary focus of Locke's discussion in relation to the state of war and resistance seemingly changes, one that has important consequences for understanding the nature of the individualism

¹⁶⁷ Ibid., 278.

underpinning his concept of self-defence. This shift is evident in the distinction he draws himself between the emergence of the state of war in the state of nature on the one hand and from the state of society on the other. In the state of nature he that attempts to take away from the freedom “that belongs to *any one* in that State” declares a state of war as “that Freedom being the Foundation of all the rest.”¹⁶⁸ By contrast in the state of society he that threatens “the Freedom belonging to those of that Society of Common-wealth” declares a state of war. Whereas the former refers to individuals in the state of nature without distinction, citing that a threat to the freedom of ‘any one’ is a declaration of a state of war, the latter, in contrast, specifically invokes their identity as members of ‘Society or Common-wealth’ over that of individuals *qua* individuals.

This shift in emphasis away from the individual towards the collective is evident elsewhere. In discussing the dissolution of government Locke posits the collective as the primary subject where a state of war erupts as a consequence of governmental tyranny and to whom the right of self-defence falls: “whenever the Legislators endeavour to take away, and destroy the Property of the People, or to reduce them to Slavery under Arbitrary Power, they put themselves into a state of War with the People, who are thereupon absolved from any farther Obedience, and are left to the common Refuge, which God hath provided for all Men, against Force and Violence.”¹⁶⁹ Where a state of war erupts under a tyrannical government it is a “fundamental Rule of Society” that is breached, occasioning the forfeiting of a power “the People had put into their hands” and which subsequently “devolves to the People...”¹⁷⁰ The image of the individual prevalent in the state of nature (or in the state of society where positive law is for some reason practically speaking of no assistance) as exercising his natural right of self-defence to protect his interests wherever he feels they are vulnerable to attack is subtly transformed in the state of society by their membership of ‘the People’ which becomes the primary subject, against whom war is declared and to whom natural law attributes the right to justified resistance.

¹⁶⁸ Ibid., 279 [italics added].

¹⁶⁹ Ibid., 412.

¹⁷⁰ Ibid.

Locke's discussion of the right to self-defence, particularly in political society, is used to emphasise the ultimate right of 'the People' or 'Society' acting collectively and by force to retake the power entrusted to the government, rather than protect the identifiable individual interest against encroachment by the state. Individualism in the manner Shapiro envisions it, whilst evident in the state of nature and deployed to present the origins of all political societies in consent, is significantly tempered by the time Locke comes to discuss self-defence in already-existing political society. Beyond the ultimate right of society to resist unjust political authority, the scope for deducing from Locke a picture of what governance according to individualist principles may look like is limited. Nor does the qualification 'unjust' give hope. This judgment was not informed by any firm, substantive criteria informed by individualist principles. Locke perceived this judgment as evident only in history, in which societies would become aware of themselves as the foundation of government and resist when necessary. He articulated no *a priori* criteria of just and unjust authority accompanying the right to resist, but relied on a more immanent judgment: "Are the people to be blamed if they have the sense of rational creatures, and can think of things no otherwise than as they find and feel?"¹⁷¹

Individual rights and political authority

Locke's theory speaks to the possibility of just resistance rather than the specific conditions in which it can be invoked, negating its basis as a principled framework for governance. Given that the lack of any common judge capable of claiming authority is the defining feature of the state of war, authoritative determination of when this situation comes into being is ultimately undecidable. Where society and the government come into conflict Locke states that appeal as to the justness of the cause "lies nowhere but to Heaven" and that "the injured party must judge for himself when he will think fit to make use of that appeal and put himself upon it."¹⁷² Whether rebellion was caused by "the people's wantonness, and a desire to cast off the lawful authority of their rulers, or in the

¹⁷¹ Ibid., 427.

¹⁷² Ibid.

rulers' insolence and endeavours to get and exercise an arbitrary power over their people" it is left to "impartial history to determine."¹⁷³ The paradox at the heart of the right to self-defence between its universal and immutable authority by virtue of the law of nature and the undecidiability of the justness of its actual exercise is encapsulated where Locke both claims that "the people cannot be judge" to determine, by any earthly, positive means, the just exercise of self-defence, whilst also claiming that the people "have reserved that ultimate determination to themselves which belongs to all mankind...whether they have just cause to make their appeal to Heaven."¹⁷⁴ Although the right of self-defence may posit society as the foundation of political authority and as possessing ultimate right over them, it seems no concrete concept of political institutions' legitimate governance can be derived from it.

Although Locke's social contract, and the right to defend it, is initially premised upon individualist principles, this guarantees no protection for the individual *qua* individual in actual political societies. If the political significance of the right to self-defence is only manifested in history by society making the 'appeal to heaven' and acting collectively, Locke articulates no necessary connection between this movement and the protection of persons by virtue of their political and moral status as individuals. The Second Treatise is littered with denials of any such connection. The people are presented as unmoved by the fate of individuals for "examples of particular injustice or oppression of here and there an unfortunate man moves them not."¹⁷⁵ Even where Locke acknowledges that oppressed individuals in principle "have a right to defend themselves" society still does not move for them "it being impossible for one or a few oppressed men to disturb the government where the body of the people do not think themselves concerned in it, as for a raving madman or heady malcontent to overturn a well-settled state, the people being as little apt to follow the one as the other."¹⁷⁶

¹⁷³ Ibid., 418.

¹⁷⁴ Ibid., 379–380.

¹⁷⁵ Ibid., 418.

¹⁷⁶ Ibid., 404.

By the final paragraph of the Second Treatise the erosion of the individual appears complete and the individual becomes submerged in the society that acts as the foundation of government. Locke pointedly states that “[t]he power that every individual gave the society when he entered into it can never revert to the individuals again, as long as the society lasts, but will always remain in the community...”¹⁷⁷ The erosion of the individual is not just a consequence of an historically contingent ignorance or unfeeling on behalf of society, but, with the entrance of political society into history, a necessary consequence of making ‘the People’ and their “right to act as supreme” the primary subject of political philosophy. The political significance of the individual from then on is subordinated to his or her membership of ‘the People’ rather than their political or moral status as individuals.

Individualism and legal reform

With the preceding analysis in mind it is difficult to see how the right to self-defence can be translated into a principled basis for treason trial reform. Although Shapiro criticises Reznick’s account of the 1696 Act for failing to grasp “what made possible their final, definitive recognition”, and Phifer for not touching on the “more fundamental considerations about social economy and the relative importance of the individual and government” that underpinned them, it is arguable that Shapiro does not capture this elusive dynamic either.¹⁷⁸ Whereas Shapiro’s argument assumes an active set of individualist principles underlying the right to self-defence that could contribute to the systematic evaluation and reform of legal procedure, upon closer examination this assumption seems fundamentally misguided. The inability to deduce any concrete, substantive political or legal rights from the right to self-defence, and the more general erosion of the individual in Locke’s analysis of political authority suggests that Shapiro is imposing a more weighty individualism upon the right to self-defence than the contemporary understanding could bear. Whereas the right to self-defence for Shapiro invokes a stark and abstract image of the individual in opposition to the state, for Locke and

¹⁷⁷ Ibid., 427–428.

¹⁷⁸ Shapiro, “Political Theory and the Growth of Defensive Safeguards in Criminal Procedure,” 218–219.

his contemporaries it invoked a more conservative one of the individual thoroughly entwined with society as they understood it.

Shapiro's attempt to give Locke's right to self-defence individualist normative political and legal consequences it cannot bear causes him to overlook the associations between Locke's work and the eventual reform of the treason trial and beyond that can be made. This is located in Locke's conception of the relation between society and political authority. Throughout *Two Treatises* is an image of society as the foundation of political authority, the author and ends of its institutions, which had long been widely held amongst influential political and legal figures, even if the specific, radical conclusions Locke made in relation to resistance were not. Locke's analysis was grounded upon a view of political authority in which the ultimate right of society who founded political institutions and who have a potentially justified right of resistance against it could never be subordinated to claims of a traditional or divine right of rule. At the same time, as we have seen above, 'society' never takes a concrete form which is fully equivalent to its institutions. Society in a sense always exceeds its concrete manifestations in history. Locke's history of political society is established between on the one hand society as prior to all political authority as its foundation and on the other beyond it as never fully reducible to concrete institutions, a restless historicism which undermined the timeless universality of divine right or the dead hand of traditional feudal right.

5. The Treason Trial

If an 'external' political critique grounded in individualism cannot be relied upon to fully explain legal reform, an analysis of the practice of the courts themselves may provide clues as to the origins of the 1696 Act. In this section an overview of the treason trials during the late-Stuart period preceding the Treason Trials Act 1696 is given. This account focuses on the distinction between fact and law that governed much of trial procedure, in

particular the assignment of defence counsel and other provisions that could work to the advantage of the accused such as granting a copy of the indictment. A picture is given of the treason trial where the traditional distinction between fact and law is frequently being undermined. Although this distinction was of course challenged by defendants in order to secure for themselves procedural advantages that could aide their defence, the records also demonstrate a more widespread uncertainty which manifested itself in contradictory positions taken by the court and frustration and confusion on behalf of different actors in the court seemingly unable to fulfil their traditionally defined institutional roles. It is argued that the increasing difficulty the courts faced in policing the distinction between fact and law spoke to the fact that the trials were being conducted in the context of wider transformations in legal order and authority impinging on their operation.

Rule against defence counsel

The standard rule in treason (and all felony) trials was that the accused was prohibited from being instructed or represented on matter of fact. Where defence counsel was assigned they were restricted to matters of law, and only where the court decided there was a substantive legal uncertainty to be resolved. The distinction between matters of law and fact was perceived to be clear and certain. That the distinction was clear was vital to proceedings as matters of law could not be debated until the facts had been settled. The judge in Algernon Sidney's trial stated that "[t]he law always arises upon point of fact; there can be no doubt in point of law, till there be a settlement in point of fact."¹⁷⁹ As will be seen in more detail, that the matter for which the prisoner requested counsel fell on the wrong side of the distinction between law and fact was invoked frequently by both judges and the king's counsel, including, for example, a request for depositions and affidavits, whether an overt-act was alleged in the indictment,¹⁸⁰ the legality of witnesses who swear

¹⁷⁹ *A Complete Collection of State Trials*, vol. 9, n.d., 867.

¹⁸⁰ The Trial of William Viscount Stafford *A Complete Collection of State Trials*, vol. 7, n.d., 1521; The Trial of Charnock, King and Keyes *A Complete Collection of State Trials*, vol. 12, n.d., 1457.

for money,¹⁸¹ assistance in putting in a plea to the court,¹⁸² and the requirement of two-witnesses to a treason.¹⁸³

Even where the accused did manage to successfully state that the issue to which they wished to have counsel heard was a matter of law rather than fact, the request would often be declined on the basis that there was not sufficient uncertainty in the matter. The court would usually claim the existence of continuous practice in the matter in order to deny any uncertainty upon which counsel could be assigned. For example, when Lord Preston sought counsel to argue that the meaning of a statute could be interpreted to give him the right to a copy of the indictment, the Lord Chief Baron, Robert Atkyns, responded that “[i]f any doubtful words be in such a statute, yet the constant practice must expound it; and since it has been so often denied, nay always, the law is now settled, that it is not within the meaning of that statute”,¹⁸⁴ assuring the accused that “it’s not the doubt of the prisoner, but the doubt of the court, that will occasion the assigning of counsel.”¹⁸⁵ In practice, judges were reluctant to concede uncertainty in the law to prisoners for which counsel should be assigned. Where counsel was assigned the issue often touched upon a politically contentious constitutional issues, such as the relationship between King and Parliament,¹⁸⁶ or the rights and privileges of the peerage.¹⁸⁷

Matters of law and matters of fact

An accused’s request for counsel was often invoked by a familiar set of procedural, evidential and substantive issues. With regards to procedure defendants often argued for

¹⁸¹ The Trial of William Viscount Stafford *A Complete Collection of State Trials*, n.d., 7:1522.

¹⁸² Proceedings against Edward Fitzharris *A Complete Collection of State Trials*, vol. 8, n.d., 260; The Trial of Stephen Colledge *ibid.*, 8:570.

¹⁸³ The Trial of William Lord Russell *A Complete Collection of State Trials*, n.d., 9:616; The Trial of Colonel Algernon Sidney *ibid.*, 9:862.

¹⁸⁴ The Trial of Sir Richard Grahme (Viscount Preston) *A Complete Collection of State Trials*, n.d., 12:660.

¹⁸⁵ *Ibid.*, 12:662.

¹⁸⁶ See Proceedings Against Edward Fitzharris *A Complete Collection of State Trials*, n.d.

¹⁸⁷ The Trial of Lord Henry Delamere *A Complete Collection of State Trials*, vol. 11, 21 vols., n.d.

access to records relating to the proceedings, such as materials submitted as evidence or a copy of the indictment upon which they were being prosecuted.¹⁸⁸ Requests for copy of the indictment were especially common, with defendants arguing their ability to make their defence was severely hampered without a copy stating the particular facts alleged or the statute under which they were charged. The jurisdiction of the court would also often be challenged by the accused. The nature of the offence meant that defendants were often political elites, and in particular many were peers in the House of Lords who by law were to be tried only by their fellow lords. For example, Lord Preston unsuccessfully attempted to take away the jurisdiction of the king's court by arguing that the baronetcy conferred on him by James II whilst in exile meant his trial should only be heard in the House of Lords, which was swiftly rejected by the court without counsel being assigned.¹⁸⁹ Defendants would also challenge the jurisdiction of the court if proceedings concerning the alleged events were underway elsewhere. Edward Fitzharris pleaded to the jurisdiction of the court, and was assigned counsel to argue that as impeachment proceedings had already begun in the House of Commons the jurisdiction of the king's court had been usurped, which was rejected by the judges after lengthy arguments had been presented by counsel on both sides.¹⁹⁰

Another issue that frequently arose was the rule that there must be two-witnesses to the treason charged, striking at the question of the force of the evidence in law.¹⁹¹ The courts' interpretation and application of the rule frequently provoked complaints from the accused, in particular the insistence that the rule only required two witnesses to the whole treason, rather than to each overt act laid out in the indictment, meaning the accused could be convicted on the basis of one witness to each overt act if they were considered part of the 'same general treason'. This interpretation was often challenged by the accused, followed by a request for counsel to be heard on the point. The exchange in Lord Russell's

¹⁸⁸ See, for example, the request for affidavits in the trial of Lord Stafford: *A Complete Collection of State Trials*, n.d., 7:1365.

¹⁸⁹ *A Complete Collection of State Trials*, n.d., 12:654.

¹⁹⁰ *A Complete Collection of State Trials*, n.d., 8:251–326.

¹⁹¹ For the origins and development of the rule, see L. M. Hill, "The Two-Witness Rule in English Treason Trials: Some Comments on the Emergence of Procedural Law," *The American Journal of Legal History* 12, no. 2 (April 1, 1968): 95–111.

trial is typical where, upon the accused criticising the court's interpretation of the two-witness rule as the "tacking of two treasons together", requested counsel to hear the point, the judge responded that in order for the rule to be contested the accused must first be "contented that the fact be taken as proved",¹⁹² effectively forcing the accused to admit the very fact he sought counsel to argue was sufficiently proven according to law. When Algernon Sidney complained of the application of this interpretation of the two-witness rule and requested counsel on it, the Lord Chief Justice abruptly halted his method, telling Sidney that his complaint was to a "point of fact" and that he "must not think the Court and you intend to enter into dialogue".¹⁹³

The substantive issue of 'overt acts' necessary to declare the treason was another familiar area of dispute. The expansive interpretation of this requirement given by the courts led to accusations that they were creating 'constructive treasons' where the provisions of the original Treason Act passed by Edward III were stretched to cover actions not contemplated by the original legislation.¹⁹⁴ Given the accused were usually captured and put on trial before their alleged designs could be put into action, the need of the courts to find an action declaring an event that had not fully manifested itself yet put a lot of pressure on the 'overt act' requirement. On the face of it, the connection between the design for which the accused was being prosecuted and the act alleged was obvious in some cases. However, in others the connection was more contentious. For example, Russell questioned whether mere consultations and counselling could be considered an overt act for the purposes of high treason. The court again responded that counsel must only be heard upon the qualification that he concede the fact, "taking it, that my lord Russell has consulted in this manner, for the raising of forces within this kingdom, and making an insurrection within this kingdom...whether then this be treason...", which Russell refused.¹⁹⁵ The status of 'bare words' as overt acts was also a contentious issue. In King's trial the accused questioned whether bare words could be an overt act of treason, the Lord Chief Justice informing him that it was "not proper now" as they were "only considering the

¹⁹² *A Complete Collection of State Trials*, n.d., 9:616.

¹⁹³ *Ibid.*, 9:861–862.

¹⁹⁴ *25 Edw III St 5 c 2*, 1351.

¹⁹⁵ *A Complete Collection of State Trials*, n.d., 9:617.

evidence upon the issue, Guilty or Not Guilty; and you are now to apply yourselves to that.”¹⁹⁶ The construction of words as an act of treason was also the decisive factor in Rosewell’s case, where the court assigned counsel in a post-verdict move against the judgement on the basis that the allegedly treasonous words laid out in the indictment were insufficiently certain in their reference to the king, and could only be made certain by innuendo, for which the court eventually found the indictment invalid after a lengthy debate between counsels.¹⁹⁷

The distinction between fact and law governing the accused’s access to counsel played a central role in structuring proceedings. Much of the court’s activity was directed towards policing its boundaries, with the prosecution and judges frequently rebuking the accused for requesting counsel on point of fact, or accusing their counsel of having moved from point of law into point of fact, and the defence on the other side challenging their interpretation. Records of the treason trials demonstrate the extent to which this concern occupied the minds of participants. The prosecution in Stafford’s case commented on the distorting effect the manner in which the accused made his defence had made on the proceedings, saying that he “hath been pleased to go off from the matter of law, to the matter of fact; and backward and forward, so that it is impossible to follow him...”, with the consequence that the repetition of such an undisciplined method elsewhere would “make trials endless”.¹⁹⁸ Charnock, in arguing exceptions to the indictment against him, was rebuked by the prosecution and told “this is to no purpose; you enter into the evidence, which is matter of fact, which is all over, and we cannot enter into any consideration of it...”,¹⁹⁹ Charnock, conceding defeat after a series of similar responses, declared that “it is impossible for me to offer anything that the court will think material; therefore it is in vain for me to speak, and trouble myself and the court with what will be of no use to me.”²⁰⁰ In a debate over whether papers taken from Colledge before his trial should be returned to him, the Lord Chief Justice was clearly guarding the integrity of the distinction when he

¹⁹⁶ *A Complete Collection of State Trials*, n.d., 12:1442.

¹⁹⁷ *A Complete Collection of State Trials*, vol. 10, n.d., 262–303.

¹⁹⁸ *A Complete Collection of State Trials*, n.d., 7:1550.

¹⁹⁹ *A Complete Collection of State Trials*, n.d., 12:1459.

²⁰⁰ *Ibid.*, 12:1460.

reminded the accused that the judges “are your counsel in matter of fact, and to give you your papers were to assign you counsel against law, they being not your own papers, but coming from a third hand.”²⁰¹ The court’s desire to maintain the integrity of the distinction went so far as to dictate the physical distribution of actors in the court room. Upon the Lord High Steward’s acquiescence to Stafford’s request that his counsel “may be near me for the arguing of what is fit to them to speak to”, the prosecution repeatedly urged they “may stand within hearing, but not within prompting”, reminding the judges of the importance of preventing counsel as to matter of facts and that maintaining this law “is not a matter of discretion”.²⁰²

Uncertainty of the distinction

Occasionally the court took a contradictory position on the same issue, one which was seemingly rooted in some confusion as to where the distinction between fact and law lay. This is evident in Russell’s trial where, in attempting to argue that the facts against him were not sufficiently proved, requested counsel as to the two-witness rule. The response of the court indicated confusion as to whether this request was based on a matter of law or fact. On Russell’s first insistence that the two-witness rule required two witnesses to each act rather than one witness to one act and one witness to another under the same general treason, the response of the Attorney General and the Lord Chief Justice suggested this was a point of law, albeit one that “has been resolved.”²⁰³ However, upon restating his desire as to whether the fact had been sufficiently proven against him according to the two-witness rule, Sergeant Jeffries responds to Russell’s request as one concerning fact, stating “[t]he fact must be left to the jury”, the Lord Chief Justice following that “there can be no matter of law, but upon fact admitted and stated.”²⁰⁴ The court appears to make a contradictory request of the accused whereby in order to be assigned counsel as to whether the evidence has been sufficiently proved according to law he must first admit that the evidence has been

²⁰¹ *A Complete Collection of State Trials*, n.d., 8:585.

²⁰² *A Complete Collection of State Trials*, n.d., 7:1339–1340.

²⁰³ *A Complete Collection of State Trials*, n.d., 9:615.

²⁰⁴ *Ibid.*, 9:616.

proved. A similar blurring between fact and law is evident in Sidney's trial when he also invoked the two-witness rule and desired counsel to argue it, the Lord Chief Justice replying that "[t]hat is a point of fact, whether there be two witnesses" before immediately following with a promise to "tell the jury, if there be not two witnesses, as the law requires in this case, they ought to acquit you."²⁰⁵ The question of whether there were two witnesses appeared to shift between being a matter of fact and a matter of law in the minds of those involved, resting on the limit of the distinction between the two.

The uncertainty of the distinction was occasionally apparent in cases where the accused requested a copy of the indictment. A copy was most often requested prior to putting in a plea, which, although the court as a matter of standard practice invariably denied it on the basis of a constant practice in the courts, the reasoning by which it was rejected was not always clear. A general plea of guilty or not guilty by the accused was understood by the court to be making a representation as to fact rather than law. For example, in Colledge's trial, where the accused refused to plead until he had his papers returned to him and had been given a copy of the indictment, the court characterised the general plea as a "plain answer" for which there was "no need of papers."²⁰⁶ With Colledge being unable to state any special plea in law as to the jurisdiction of the court, the Lord Chief Justice urged the accused to "rely upon the fact and plead Not Guilty,"²⁰⁷ stating also that, in contrast to the plea which concerned only matters of fact, "[a]ll matters of law are saved to you after you have pleaded."²⁰⁸ Although the granting of a copy of the indictment is clearly seen as inappropriate given that the general plea was a matter of fact, whether this rule stemmed from the indictment's concern with law only or its potential use as an artificial aide to matters of fact is unclear. This uncertainty is clarified somewhat where a special plea was put in, as to jurisdiction for example, and a copy of the indictment was requested. For example in Fitzharris's case the Attorney General was evidently anxious that, in granting his defence counsel a copy of the indictment in order to argue that impeachment proceedings already begun in the House of Commons removed jurisdiction from the king's

²⁰⁵ Ibid., 9:861–862.

²⁰⁶ *A Complete Collection of State Trials*, n.d., 8:577.

²⁰⁷ Ibid., 8:579.

²⁰⁸ Ibid., 8:572.

bench, the court risked allowing the counsel to represent their client as to fact, stating that it would be as if they were “assigned as counsel to all events,” and that there is no reason for counsel to desire a copy as “they are not to advise in that.”²⁰⁹ The denial of a copy where the plea was clearly legal in nature, and the reasoning behind the caution expressed by the king’s counsel, clearly suggest that the indictment would be an assistance in matters of fact contrary to traditional practice. In this context a copy of the indictment was seemingly granted on the basis that it concerned matters of fact.

Uncertainty surrounding the indictment’s relation to the distinction between fact and law was evident in equivocal statements by the bench in Rosewell’s trial. Whereas Rosewell was initially firmly rebuked in the orthodox manner when he requested a copy before pleading,²¹⁰ elsewhere in the trial the position of the court appeared more uncertain. After the verdict had been given, Rosewell moved to arrest judgment on the basis that the words in the indictment were insufficiently laid; in particular that to make the words laid in the indictment appear so they are directed at the king and government, as is necessary for an overt act of treason, required the operation of an innuendo which was not explicitly stated in the indictment. This was an issue upon which, according to the Lord Chief Justice, “there ought...to have been an averment.”²¹¹ When counsel, having been assigned to the accused, requested a copy of the indictment in order to argue to its validity, although the request was eventually rejected the judges engaged in an unusually long dialogue amongst themselves and with counsel, and their opinions were unusually equivocal. The Lord Chief Justice even admitted that denial of the indictment was one of many factors that made treatment of suspected felons “a hard case”, offering the orthodox reasoning behind the denial in an almost apologetic tone.²¹² The uncertainty of the court is evident also in the fact that the Lord Chief Justice relied on his being “loath to be the author of precedents in cases of this nature” rather than the strength of the reasoning behind the practice in law, and that despite no copy being granted in the trial the judges ensured that no rule be

²⁰⁹ Ibid., 8:260–261.

²¹⁰ *A Complete Collection of State Trials*, n.d., 10:152.

²¹¹ Ibid., 10:299.

²¹² Ibid., 10:267.

made.²¹³ Despite the rule against the accused receiving counsel as to fact applying as much here as in any other case where a copy of the indictment was denied, an argument indeed made by the Attorney General, the uncertainty and equivocation evident in the judges' reasoning, and the willingness of the court to hear defence counsel speak to issues touching closely upon the facts which in other trials had been firmly prevented, suggests that the judges' decision to deny the granting of a copy of the indictment to the accused was determined by the overwhelming force of the practice's history rather than the strength of its reasoning grounded in the distinction between fact and law.

The perception of the jury's role was also governed by the distinction between fact and law. The orthodox understanding of the jury's role is illustrated in the Lord Chief Justice's summary to the jury at the end of Colledge's trial, where he distinguishes between the force of the evidence and the truth of the evidence. Whereas the truth of the evidence is reserved to the jury as "the proper judges", its force "is a point of law that belongs to the court and wherein the court is to direct you".²¹⁴ As the force of the evidence involves considerations of "what the charge is," "the law concerning the charge," and "whether this evidence...is sufficient to maintain the indictment",²¹⁵ it involves matters of legal interpretation that judges reserved for themselves in order to maintain the integrity of the distinction between law and fact.

Despite the apparent clarity with which the judges distributed these roles within the court, at the end of Rosewell's trial they became the subject of considerable uncertainty. In response to the Lord Chief Justice's assertion that in order for the words allegedly spoken by the accused to be a sufficient overt act the indictment should have explicitly asserted that they were spoken about the king, so as to make it an issue to be proved in the court, the Solicitor General remarked:

²¹³ Ibid., 10:268.

²¹⁴ *A Complete Collection of State Trials*, n.d., 8:710.

²¹⁵ Ibid.

We are never bound by law to aver 'that' that we cannot prove. And therefore I put all upon that dilemma; either the words import of themselves to be spoken of the king, or they do not. If they do not, if we had said, 'dixit de domino rege,' it must have been proved, and that would have been to have left it to the jury who he did mean. And they be not self-evident, *God forbid the jury shall be charged to find out such a meaning*; but if they are self-evident, they need no averment."²¹⁶

Here the Solicitor General stumbles upon the tension inherent in the direction given by the Lord Chief Justice in Colledge's case, that, at least when applied to the particular circumstances of Rosewell's case, issues of the truth and force of the evidence are difficult to distinguish. Where the meaning of the words are not 'self-evident' (as the Solicitor General understands it), the jury's truth-judgment is not so much directed just to the words themselves but also the intention behind them determining their meaning. For the Solicitor General this shift from declaring facts to interpreting meaning clearly pushes the jury beyond what was considered its traditional and legitimate function, causing it to encroach upon issues of law usually reserved to the judges. An awareness that the boundary between fact and law was being negotiated through competing perceptions on the function of the jury is evident also in Colledge's summing up to the jury, where he appeals for them to "do according to your judgments and your consciences; you are to be my judges both in law and fact..." – the most noteworthy aspect of this statement perhaps being that neither the judges nor the prosecution appeared to take it upon themselves to rebuke or correct Colledge upon this point.²¹⁷

Defence counsel and matters of law

The contentiousness of the judges' narrow understanding of 'matters of law' was evidenced in dialogues between the court and the accused concerning the assignment of counsel, as well as defence counsels' perception that they were unable to perform their

²¹⁶ *A Complete Collection of State Trials*, n.d., 10:300–301. Italics added.

²¹⁷ *A Complete Collection of State Trials*, n.d., 8:694.

duty once assigned within the restrictions imposed by the court. In Preston's trial the accused requested counsel in order to challenge the jurisdiction of the court, arguing that no overt-act could be said have been committed within Middlesex, the county where the case was being heard. The prosecution relied on the fact that he had boarded a ship at Surrey-Stairs in Middlesex, and that in boarding the ship he was executing a treasonous design to go to France with papers advising the exiled king how to invade England. Whilst Preston appears not to dispute the fact that he boarded the ship, he denies that it was done with any treasonous design, arguing there was neither proof that he had a design to go to France, nor that he was found with any papers, or that they were his. Preston insisted this was a matter of law and demanded counsel to hear it, which the Lord Chief Justice rejected citing it was a matter of fact. The court, however, took the unusual step of claiming the issue to be a matter of fact before, perhaps sensing the significance of the matter, immediately going on to agree to present their opinions on the matter as a "question upon a supposition".²¹⁸ Despite the court giving their opinion Preston continued to insist that a matter of law was at stake for which he should be assigned counsel, which the judges again denied.

The conflict between Preston and the court appears to have been in the nature of the court's 'supposition', in particular whether they were supposing a matter of law or fact. The court supposed that treasonous intent had itself been proven, which determined the meaning and relevance of all the actions alleged against Preston in regards to jurisdiction. The court saw this intention purely as a matter of fact to be proven, but was supposing it had been for the purpose of discussing the jurisdiction of the court, which was the matter of law at hand. As such the question of law for the court appeared to be: Assuming a treasonous design has been proven in fact, and assuming the boarding of the ship to be part of that design, is that enough to bring the case within the jurisdiction of Middlesex? For Preston, however, the supposition itself contained a matter of law for which he demanded counsel. Although Preston didn't dispute the fact that he boarded a ship at Surry-Stairs, he still claimed that "nothing has been proved in Middlesex".²¹⁹ For Preston, what had not

²¹⁸ *A Complete Collection of State Trials*, n.d., 12:728.

²¹⁹ *Ibid.*

been proven was not so much the act of boarding the ship, but the inference of a treasonous mind that was drawn from the boarding the ship. But whereas the court saw the proving of the intention purely as a matter of fact, but which the court was 'supposing' for the purpose of discussing the law concerning the court's jurisdiction, for Preston the inference of the intent was in itself a matter of law for which counsel should be assigned.

The vulnerability of the courts' definition of matters of law also emerges when defence counsel, having been assigned to argue a particular issue by the court, struggled to perform their role in proceedings within the restrictions imposed upon them by the courts' policing of the fact and law distinction. For example, in Fitzharris's plea to the jurisdiction of the king's court, counsel could only argue to take away the jurisdiction of the court on the basis that the same matter was being heard in the House of Commons. Counsel insisted that in order to argue the matter they required a copy of the indictment as "[t]hings must be averred to be the same; which we cannot, unless we see what is alleged."²²⁰ The court attempted to give a veneer of meaning to the proceedings by insisting counsel would not be tied to the form of the plea and need only make a case for its substance. However, when asked why they hadn't followed instruction to put their plea in to the prosecution the day before the court readjourned, the defence counsel's response illustrated the difficulty faced in exercising their duty with the trial structured as it was: "Mr Attorney was here upon Saturday, when this matter was first started, and he knew the substance then: We know not what it is more than by report."²²¹ Being denied material concerning the fact had restricted their ability to make a plea regarding the law.

A similar struggle appears in Stafford's case when counsel was assigned by the court to argue for the accused against the court and prosecution's definition of the two-witness rule. Although counsel acknowledged the principle had been argued "one way or the other," they evidently struggled to put forward an argument. Counsel had, unusually, been assigned on a point of law abstracted from any settlement of the facts, and complained that

²²⁰ *A Complete Collection of State Trials*, n.d., 8:257.

²²¹ *Ibid.*, 8:258.

“to apply ourself to study an unforeseen case before it be agreed, stated, and judged worth of argument, cannot be expected from us.”²²² To argue the point abstracted from settled facts was seemingly considered meaningless. But on the other hand, to argue the law upon hypothetical facts yet to be settled risked being rebuked, and possibly worse, for representing the accused on matter of fact contrary to traditional practice.

The debates between the accused and the court concerning the assigning of counsel, and the difficulties counsel faced once assigned in performing their duty, appear to be rooted in competing perceptions of how law and fact interact in the trial. In Preston’s trial, although the court appeared to acknowledge the significance of the issue by their willingness to break with traditional practice and enter into a dialogue with the accused on the basis of a hypothetical settlement of the facts, from Preston’s perspective the restrictions imposed upon this dialogue by the narrow interpretation of what was a ‘matter of law’, demonstrated by the court’s refusal to assign counsel, meant the dialogue failed to reach the heart of the matter. Similarly, defence counsel in Fitzharris’s and Stafford’s trial felt they were denied the opportunity to properly debate the matter of law upon which they were assigned by the restrictive interpretation the court imposed upon it. Although this competing perspective was given little clear definition in the trials themselves, it clearly speaks to the distinction between fact and law upon which the traditional rule against defence counsel rested.

The challenge to the traditional understanding of the distinction between fact and law was not agitated merely by those who had a vested interest in undermining it so as to be assigned counsel and therefore increase the likelihood of being acquitted. As this section has illustrated, a tension in the distinction emerged in other aspects of court practice, evidenced by the contradictory position taken by the courts regarding the two-witness rule, copies of the indictment, and the role of the jury. As such it cannot simply be reduced to the accused’s natural desire to defend themselves as forcefully as possible against the imbalance of power within the court room. It suggests instead that the rule against defence

²²² *A Complete Collection of State Trials*, n.d., 7:1526.

counsel was being challenged by a more deep-seated development, striking at the distinction between fact and law that governed the rule and the trial in general. The next section explores how this uncertainty manifesting itself in the treason trial had its roots in competing perspectives on how the law itself operated to criminalise treasonous behaviour and the interpretive questions they posed for court practice to resolve.

6. The Law of Treason

The restrictions of the trials considered above meant it was difficult to articulate in any detail the content of the competing perspectives on the interaction between fact and law and how they challenged traditional practice. This section gives the tension identified in practice greater detail by drawing upon a selection of commentaries and pamphlets from both the late-Stuart period when some of the most infamous treason trials took place as well as the period following the Glorious Revolution when reform of the treason trial was put onto the political agenda. As will be seen, the tension evident in court practice was rooted ultimately in a particular perception of how the law criminalised behaviour, one which envisioned a more nuanced and interpretive interaction between facts and law that undermined the traditional distinction the courts attempted to maintain and, subsequently, the traditional justification for the rule against defence counsel.

As the scope of ‘compassing or imagining the death of the king’ was extended by the doctrine of constructive treason, the nature of its relationship to the treasons declared by the other branches of the 1351 Act came under increased scrutiny. The extension of compassing the death of the king to include in principle conduct not only threatening harm to the person of the king but also attacking his authority more generally extended the reach of the offence into conduct which on the face of it was already regulated by the other treasons declared in the Act. Such uncertainties relating to the general structure of high treason offences came to be of concrete importance in relation to conspiracies and plots to

levy war against the king. On the one hand, the doctrine of constructive treason extended compassing the death of the king to include not only the actual death of the king but also attempts to 'render him a subject'. This in principle meant that not only was the actual levying of war against the king treasonable - already declared to be so by a separate branch of the 1351 Act but arguably indictable also as compassing the death of the king via the doctrine of constructive treason – but so were conspiracies to levy war against the king insofar as an overt-act declaring such a conspiracy declared also the intention to despoil the king of his realm and could therefore be considered to entail a compassing of the king's death. Insofar as the doctrine of constructive treason was by this period widely accepted as law this extension of compassing the death of the king to include conspiracies to levy war relied upon a reasonable interpretation of the law.

However, the arguments against such an extension also had a sound legal basis. In declaring by the 1351 Act the actual levying of war to be treason, Parliament must also have considered the treasonable status of conspiracies to levy war, and, moreover, in limiting the offence to the actual levying of war must have rejected this possibility. The constructive extension of compassing the death of the king to include conspiracies to levy war could therefore be interpreted as explicitly going against Parliament's intention to leave such conspiracies outside the reach of treason. As the 1351 Act was the sole legal foundation of high treason at the turn of the seventeenth century, all other statutes expired or repealed and the concept of common law treasons not already declared by the 1351 Act of dubious legality, there was no other legal basis on which to make such conspiracies treasonable.

The status of conspiracies to levy war against the king was arguably the most important issue afflicting the law of treason in the seventeenth-century, with the debate played out with somewhat uncharacteristic directness in the influential commentaries and treatises of the period. Writing at the beginning of the seventeenth century Coke states quite clearly his position that making conspiracies to levy war an overt-act of compassing the death of the king goes against the law as declared by the 1352 Act. Citing the requirement of that act that an overt-act be proved in connection with each of the offences

declared therein, Coke notes this requirement “relateth to the severall and distinct treasons before expressed, (and specially to the compassing and imagination of the death of the king, &c. for that it is secret in the heart) and therefore one of them cannot be an overt act for another,” holding in relation to conspiracies to levy war in particular that it “is no treason by this act until it be levied, therefore it is no overt act or manifest proove of the compassing of the death of the king within this act: for the words be (*de ceo*, &c.) that is, of the compassing of the death” for to do so would be “to confound the severall classes, or *membra dividuntia, et sic de ceteris, &c.*”²²³

Coke’s interpretation of the law was however subject to challenge later in the century. For example, Kelyng reports from the trial of the Farley Wood Plot of 1663 a resolution of the judges that on the point of conspiracies to levy war Coke “expressly contradicts himself”, an example of how in Coke’s writings on treason “many great Errors were published.”²²⁴ Hale similarly notes that Coke’s interpretation of the law here “seems to contradict what is elsewhere by him said.”²²⁵ The basis for these claims rested upon the conviction that Coke had elsewhere in his commentary reported decisions which pointed towards the general proposition that a conspiracy to levy war against the king could be laid as an overt-act of compassing the death of the king, despite Coke’s denials. Both Kelyng and Hale rely in particular on Coke’s citing the cases of *Cobham* and *Essex*, both of which involved plots not to directly kill the monarch but to imprison them and take them into their power. Coke’s approval of these decisions is particularly significant as they can also be seen to mark his approval of the doctrine of constructive treason in general. Coke in fact cites the decisions in *Cobham* and *Essex* as authority for the general proposition at the core of the doctrine of constructive treason that preparation to depose or imprison the king is a sufficient overt-act of compassing the death of the king as it is “to make the king a subject” and “dispoyle him of his kingly office of royall government.”²²⁶

²²³ Coke, *The Third Part of the Institutes of the Laws of England*, 4–5.

²²⁴ John Kelyng, *Reports of Crown Cases in the Time of King Charles II*, 3rd ed. (London: Stevens and Haynes, 1873), 26.

²²⁵ Hale, *The History of the Pleas of the Crown*, 1:120.

²²⁶ Coke, *The Third Part of the Institutes of the Laws of England*, 11.

In Kelyng and Hale's view Coke had erred in failing to appreciate that once the doctrine of constructive treason is recognised as part of the law of treason, as Coke did, there is no principled basis upon which a conspiracy to levy war cannot be laid as an overt-act of compassing the death of the king. For Kelyng therefore where the accused is "indicted for the Treason of compassing and imagining the King's Death...consulting to levy War is an Overt Act to prove that Treason", a proposition approvingly cited by Hale.²²⁷ Seeing the crime of levying war against the king and compassing the death of the king as having a common basis in an attack on the king's rightful authority, Kelyng pushes the logic of constructive treason a step further in proposing that "if Persons do actually levy War, so that they may be indicted for the Treason of levying of War, within the Stat 25 Ed 3 yet they may be indicted for compassing the King's Death, and their actual levying of War may be laid as an Overt Act to prove the compassing the King's Death."²²⁸

Although Kelyng and Hale agreed that a conspiracy to levy war could be laid as an overt-act of compassing the death of the king, beyond this particularity there were nevertheless important differences in their respective interpretations of the scope of the offence. These differences arose most prominently in connection with two particular issues. The first concerned how a compassing the death of the king as laid in the indictment was to be proven in court – in particular whether the prosecution must prove the specific overt-act laid in the indictment or whether other methods of proving the offence were available – seemingly a matter of procedure but one which had important implications for the substance of the offence. Kelyng appears to adopt an expansive interpretation of how a compassing the death of the king may be proven. He holds that where one overt-act is laid in the indictment "then any other Act which tends to the compassing the King's Death, may be given in Evidence together with that which is laid in the Indictment."²²⁹ Whilst such a proposition may on the face of it seem uncontroversial, Kelyng does not clarify whether or not the overt-act actually laid in the indictment must be proven in order secure conviction or whether the accused may be convicted solely on evidence of the overt-act not laid in the

²²⁷ Kelyng, *Reports*, 25; Hale, *The History of the Pleas of the Crown*, 1:121–122.

²²⁸ Kelyng, *Reports*, 25.

²²⁹ *Ibid.*, 9.

indictment. Hale certainly appears to adopt the latter interpretation of Kelyng's proposition, a position which he goes on to criticise more generally. After quoting in length a resolution from the trial of the Farley Wood plotters in which this expansive interpretation of how a compassing the death of the king may be proven is given, Hale states that he could "never assent to" it, and further that "[a]s [the overt-act] must be laid, so it must be proved; for otherwise, if another act than what is laid should be sufficient the prisoner would never be provided to make his defence."²³⁰

A second issue upon which Kelyng and Hale's conflicting perspectives on the scope of compassing the death of the king arises is the status of words as treason, an issue which in the context of the conflicts and upheavals of seventeenth-century England had become a matter of significant political and ideological symbolism. Coke's claim that bare words were neither treason at common law nor an overt-act to declare a treason under the 1351 Act was invoked as a cornerstone of English liberty, and his attacks on the kings and parliaments that previously made words into treason was often celebrated as its great statement.²³¹ However, the grounds upon which Coke held bare words not treasonable were often more equivocal than the firmness of his conclusions suggested, citing intrinsic evidential weakness "seeing such variety amongst the witnesses are about the same [words], as few of them agree together," rather than in the nature of treason itself.²³² Furthermore, although bare words may not have been treasonable, Coke held that if the same words were set down in writing this could be a sufficient overt-act under the 1351 Act.²³³

Kelyng capitalised on this ambiguity in order to argue that there was nothing in the nature of the offence against bare words as an overt-act of compassing the king's death. If words set down in writing were an overt-act to prove such a compassing then, notwithstanding potential evidential concerns, "Words spoken are the same thing if they be

²³⁰ Hale, *The History of the Pleas of the Crown*, 1:121–122.

²³¹ Coke, *The Third Part of the Institutes of the Laws of England*, 14.

²³² Ibid.

²³³ Ibid.

proved”.²³⁴ In more general and conclusive terms Kelyng also proposes that “if a Man be indicted for compassing the King’s Death, there Words may be laid as an Overt Act to prove that he compassed the Death of the King”,²³⁵ citing as authority the decision in the case of *Crohagan* where the accused, having spoken “I will kill the King, if I can come at him” whilst in Portugal, was upon his return to England indicted and convicted for compassing the death of the king with those words laid as an overt-act. For Kelyng “Words are the natural way for a Man whereby to express the Imagination of the Heart” and “If it be in any way declared that a Man imagineth the King’s Death, that is the Treason within the *Stat. 25 Edw 3.*”²³⁶

Hale adopts a more nuanced and cautious position on bare words as an overt-act of compassing the death of the king. On the one hand he cites approvingly Coke’s general rules that bare words can neither be in themselves treason nor an overt-act of compassing the king’s death.²³⁷ However, he cites two “exceptions or allays” to the general rule in which he gives a more precise interpretation of the role of bare words to prove compassing the king’s death. According to the first exception “words may expound an overt-act....which overt-act possibly of itself may be indifferent and unapplicable to such an intent [of compassing the kings death]” and so such words “may be joined with such an overt-act, to make the same applicable and expositive of such a compassing”, whilst the second maintains words “expressly menacing the death or destruction of the king” are a sufficient overt-act.²³⁸ Although Hale does not elaborate on the second exception, he cites *Crohagan* as authority for the first, offering a reading of it different to Kelyng’s in noting “there was something of an overt-act joined with [Crohagan’s words], namely his coming into *England*”, which although “an act indifferent in itself as to the point of treason” the purpose of the act “expounded...by his minatory words...make his coming over to be probably for that purpose and accordingly applicable to that end.”²³⁹

²³⁴ Kelyng, *Reports*, 15.

²³⁵ *Ibid.*, 14.

²³⁶ *Ibid.*, 15.

²³⁷ Hale, *The History of the Pleas of the Crown*, 1:114.

²³⁸ *Ibid.*, 1:115.

²³⁹ Kelyng, *Reports*, 116.

From the summary above it can be seen that, in relation to the nature of the requirement to prove an overt-act and the status of words as overt-acts, Kelyng offered a more expansive account of compassing the death of the king than Hale. Moreover, the contrasting conclusions both reached on these key issues were premised upon different interpretations of the role and function of the different elements of the offence – in particular the overt-act.²⁴⁰ For Kelyng, the overt-act was an evidential rather than substantive requirement, demanding a particular standard of evidence to prove the compassing but not touching upon the nature of the compassing itself. As long as the evidence presented in court met this standard of proof the accused could be convicted for the compassing laid in the indictment. And as long as the accused was adequately proven to have spoken the words alleged they were a sufficient overt-act to declare the compassing. Hale on the other hand saw in the requirement for an overt-act a matter of substance touching upon the nature of the compassing itself. If the accused was convicted on the basis of evidence pertaining to an overt-act different from that laid in the indictment, he or she has effectively been convicted of an offence different from that for which they were indicted. Bare words alone are not a sufficient overt-act of compassing the death of the king because it is in the nature of such compassing that some step be taken towards the execution of their intent.

Whilst these contrasting conclusions on the scope of the offence each author arrived at were to some extent no doubt influenced by external factors, their different interpretations of the role and function of the overt-act can also be rationalised from within the development of the law itself. Kelyng's interpretation of the overt-act can be seen to draw simultaneously upon two different concepts of the crime targeted by the offence which in turn were premised upon two different concepts of treason itself, both of which exercised considerable influence on the shape and development of the law. On the one hand, in dissociating the overt-act from conduct directly threatening harm to the person of the king Kelyng drew upon the concept of treason embodied by the doctrine of constructive

²⁴⁰ For a discussion on the role of the overt-act in the law of treason during this period, see Willard Hurst, "English Sources of the American Law of Treason," *Wisconsin Law Review*, 1945, 315–56; Fletcher, *Rethinking Criminal Law*, 207–213.

treason that the crime consisted in acts against the authority of the king. On the other hand, his interpretation of the overt-act as an evidential rather than substantive requirement drew upon a more traditional concept of treason which could be traced back to the origins of the offence and which saw the crime as consisting in the moral treacherousness of subverting the personal bonds of loyalty and obligation existing between the king and his subjects. It will be noticed that Kelyng's interpretation of the overt-act as an evidential requirement corresponded with a distinctly unspecific account of the substantive content of the offence, rarely if ever attempting to define or add detail to the nature of the compassing envisioned. Instead he appears to rely on the fact that the moral treachery of certain acts or words spoken presented in evidence will speak for itself and be immediately recognisable to the court. His interpretation of the law appears to be premised then on a concept of treason as an act against the authority of the king, the nature of which is shaped within the moral experience of the community constituted by a network of personal bonds and obligations rather than positively defined by the law.

Informing Hale's interpretation of the overt-act on the other hand is a more consistent attempt to draw upon the concept of treason embodied in the doctrine of constructive treason than can be seen in Kelyng. It will be recalled that Hale's interpretation is marked by the view that the overt-act is not only an evidential requirement but also touches upon the nature of the compassing itself. Hale gives some indication of the substantive content of the overt-act in his discussion of conspiracies to levy war as an overt-act of compassing the death of the king where he attempts to clarify the relation of his position on this question to that put forward by Coke and Kelyng. Having outlined both of these positions he puts forward a distinction between two different types of conduct *prima facie* resembling a conspiracy to levy war which he claims "reconciles in some measure both resolutions."²⁴¹ On the one hand he notes that conspiracies "to depose or restrain, or enforce him to any act, or to come to his presence to remove his counsellors or ministers, or to fight against the king's lieutenant or military commissionate officers" are sufficient overt-acts for they are "directed against the person of the king, and he, that designs to fight

²⁴¹ Hale, *The History of the Pleas of the Crown*, 1:122.

against the king, cannot but know at least it must hazard his life,” citing the case of *Essex* as an example.²⁴² On the other hand he notes that “if it be a levying of a war against the king merely by interpretation and construction of law....this seems not be an evidence of an overt-act to prove compassing the king’s death, when it is so disclosed upon the proof, or if it be so particularly laid in the indictment”, citing the case of pulling down enclosures or bawdy-houses as examples.²⁴³

Although Hale’s distinction may clarify the particular point of what types of conspiracies or plots are sufficient overt-acts of a compassing the death of the king, it does not on the face of it shed much light on the nature of the overt-act as a substantive component of the compassing. In particular by marking out conspiracies to levy war not considered sufficient overt-acts on the basis of being against the king “merely by interpretation and construction of law” the distinction is somewhat illogical insofar as those attacks on the authority of the king which Hale himself identifies as overt-acts were recognised as such by virtue of the doctrine of constructive treason extending the ‘person’ of the king by such interpretation and construction of law. The view of the substantive content of the overt-act upon which the distinction identified by Hale is premised is made apparent if we look closely one of the positions he was aiming to reconcile with this distinction. The basis of Hale’s distinction clearly draws heavily upon Coke’s distinction between what does and does not constitute an actual levying of war, his use of examples to illustrate a sufficient overt-act of compassing the king’s death broadly mirroring Coke’s use of the same examples in relation to the actual levying of war. Coke however gives a different formulation of the distinction from Hale, with attacks where the pretence is “publick and general” constituting a levying of war whilst those that are “private in particular” not.²⁴⁴

²⁴² Ibid., 1:123.

²⁴³ Ibid.

²⁴⁴ Coke, *The Third Part of the Institutes of the Laws of England*, 9.

Although Hale may have been constrained by the personal nature of the harm envisioned in compassing the death of the king when formulating his distinction, it seems quite clear that he was drawing upon the principle embodied in Coke's clearer and more general version. For Hale, a conspiracy to levy war "directed against the very person of the king" but not against the king "merely by interpretation or construction of law" is one which was 'public and generall' in pretence. This insight into Hale's interpretation of what types of conspiracy constitute sufficient overt-acts of compassing the king's death also reveals something about the substantive content of overt-acts as a component of the nature of compassing more generally. The requirement of an overt-act appears to demand that the conduct under consideration have a 'public and generall' character understood as concerning the public and constitutional authority of the king. The use of the vague term 'concerning' is appropriate because in Hale's analysis the overt-act imposes requirements as to both aim or purpose and proximity of conduct. We have already seen above in relation to conspiracies to levy war how Hale interprets the overt-act as requiring that conduct in its aim or purpose be directed at the authority of the king. The proximity requirement on the other hand is revealed in his discussion of bare words as overt-acts. His approving citation of the general rule that bare words are not sufficient overt-acts of compassing the king's death may not in itself reveal anything about why Hale may have seen words as not in the nature of an overt-act, but his interpretation of the decision in *Crohagan* arguably does. In presenting the judges as relying upon *Crohagan*'s coming to England as the overt-act declaring the compassing and not his bare words spoken when abroad, Hale appears to be motivated by a conviction that for conduct to constitute an overt-act it must not only evidence a treasonous aim or purpose but also signify a concrete step taken towards its execution. Only being bare words *Crohagan*'s threat against the life of the king was too remote from actually putting such a plan into place to constitute an overt-act. His coming to England signified an execution of his intent evidenced by his words, bringing him closer to actually attacking the king and therefore constituting a sufficient overt-act.

Having outlined Hale's view of the substantive content of the overt-act, the claim made above that in his interpretation of the role and function of the overt-act he drew more consistently than Kelyng on the concept of treason embodied in the doctrine of constructive

treason can now be substantiated. It will be recalled that the general effect of the doctrine of constructive treason was to extend the term 'death of the king' to include not only his actual death but also circumstances which "make the king a subject" and "dispoyle him of his kingly office of royall government." This more expansive notion of the king's death brought within the reach of the offence conduct attacking the authority of the king invested in him as head of state, reflecting a concept of treason conceiving it in part at least as a crime against the state. There is little evidence that this concept of treason was prominent in Kelyng's interpretation of the offence as he made little attempt to define the substance of 'compassing the king's death' as an attack on his role as head of state, relying instead on the sense that treachery and disloyalty are immediately recognisable to the moral sensibility of the court and community. Hale's interpretation of the overt-act however draws the boundaries of the offence around the concept of treason as a crime against the state by requiring that conduct punishable as a compassing the death of the king directly concerns the king as head of state. Only conduct which has as its primary aim or purpose an attack on the authority invested in the king by virtue of his role as head of state can be considered treasonable. Whilst some riots and other forms of lawlessness may frustrate or threaten the king's lawful exercise of his constitutional powers, not having the temporary or permanent alteration of such powers as their primary aim or purpose they cannot be conceived as a crime against the state as such and therefore fall outside the scope of the offence. Similarly, although certain types of conduct may in their express disregard or criticism of the king be considered morally distasteful, unless it actually puts into action a set of events with the aim of temporarily or permanently depriving the king of his authority such conduct is too remote to pose a concrete threat the security of the king's status as head of state and therefore cannot be considered a crime against the state and as such also falls outside the scope of the offence.

This interpretation of compassing the death of the king as a crime against the state also corresponds with a transformation in the sense in which conduct targeted is considered criminal in a broader sense. The criminality of such conduct does not so much reside in its intrinsically immoral quality, nor is the harm the offence seeks to punish and prevent conceived to be immediate to the moral experience of the community. Rather, the

criminality of such conduct in part resides in the breach of a general and abstract rule protecting an interest identified and defined by the law - in this case the constitutional position of the king and the security of the constitution and the state more generally. Moreover the harm to the community consists more directly in the interference with a legally protected interest rather than in any disruption to the internal moral order of the community. Given the element of 'compassing' in the offence and Hale's reference to what the accused "cannot but know" in conspiring to levy war against the king, it may on the face of it appear that underlying Kelyng's and Hale's contrasting interpretations of the offence is a conflict between the patterns of manifest and subjective criminality. In Hale's interpretation of the offence the overt-act would be taken to represent the external element of conduct, whilst the intent to interfere with the legally protected interest of the authority of the king would represent its internal aspect. Hale's interpretation of the role and function of the overt-act however precludes any reading of such a clear analytical distinction between internal and external aspects of the offence. This appears most prominently in his discussion of conspiracies to levy war as an over-act where, in connection to the pulling down of enclosures or bawdy-houses, he reveals the very specific relationship he envisioned between the overt-act and the criminal mind, stating "tho *prima facie* if it be barely laid as a levying war against the king in the indictment, it is a good overt-act to serve an indictment of compassing the king's death, till upon evidence it shall be disclosed to be only to the purpose aforesaid, and so only an interpretive or constructive levying of war."²⁴⁵ This passage shows that Hale clearly conceives of a conceptual connection between the overt-act and the criminal mind. Although an overt-act may be "good...to serve an indictment of compassing the king's death" whether it is truly in the nature of an overt-act cannot be determined until it is interpreted in light of evidence presented as to the purpose of the accused where it may be "disclosed to be...only an interpretive or constructive levying of war."

Insofar as the criminal mind does not function as a formally distinct condition of liability but rather as evidence supporting the determination of whether conduct constitutes

²⁴⁵ Hale, *The History of the Pleas of the Crown*, 1:123.

an overt-act it cannot be said that the interpretation of the offence which Hale gives embodies the concept of subjective criminality. But nor can it be said to embody the concept of manifest criminality. It has already been shown above how Hale's interpretation of the role and function of the overt-act was shaped by a concept of treason as an offence against the authority of the king envisioned as a legally protected interest rather than an act of moral treachery. What we see running through Hale's interpretation of compassing the death of the king is a concept of criminality which draws upon both the concepts of manifest and subjective criminality but is reducible to neither. On the one hand this sense of criminality is in part constituted by the breach of a general and abstract rule prohibiting conduct interfering with a legally protected interest. We have seen that Hale's interpretation of the role and function of the overt-act is premised on the requirement that in proximity and purpose conduct must directly concern the authority of the king in his role as head of state. On the other hand the role of the criminal mind as evidence drawn upon in determining the nature of the overt-act ensures that the general and abstract rule prohibiting conduct interfering with the authority of the king in his role as head of state does not fully take on the character of an external imposition, but draws upon the experience of the community in the interpretation and application of the rule in the courts. The criminality of treason is not identical with the notions of treachery and betrayal residing in the moral experience of the community, but nor is it identical with the need of the state to protect itself from elements in the community perceived to be dangerous to it. What we see in the interpretation of compassing the death of the king given by Hale is the emergence of the criminal mind at the juncture of these two dynamics in the law of treason, embodying a concept of criminality drawing upon the experience of a community ordered and regulated by the deployment of law to protect individual and social interests.

It remains to locate the analysis conducted in this section within the wider argument of the chapter. It has already been shown that Hale interprets the different elements of the offence from the perspective of the protection of the authority of the king as head of state, and in that sense represented a consistent and coherent attempt to root the offence in the concept of treason embodied by the doctrine of constructive treason. Insofar as the argument developed in this chapter is premised on the centrality of this doctrine in the law

of treason throughout the seventeenth century the relevance of the analysis in this sense speaks for itself. It must also be shown how this analysis bears on the other major component of the argument - that the eventual reform of the treason trial at the end of the seventeenth-century was in part motivated by a sense of the breakdown of the distinction between matters of fact of matters of law which governed the procedure of the traditional treason trial. In order to do this it is necessary to recall how the concept of criminality given full expression by Hale was differentiated from both manifest and subjective criminality. On the one hand the fact that conduct needed to be brought into connection with abstract interests identified and defined by the law meant that all evidence presented to the court potentially concerned matters of law. It could not be relied upon that the criminality of the accused would manifest itself before the court, which as we have seen was one of the key principles upon which legal counsel was denied to the accused in matters of fact. On the other hand, the fact that the application of the abstract and general rule prohibiting conduct interfering with this interest necessarily required interpretation in light of evidence presented concerning the state of mind of the accused meant the rule could not simply be imposed on the basis that it was settled and well-established within the law, which as we have also seen was often invoked as a basis for denying the accused legal counsel concerning matters of fact. More generally we can see that within this concept of criminality the criminal mind itself emerges as an interpretative legal concept *par excellence* – constituted only in relation to interests identified and defined by the law yet made real only before the courtroom as the forum for the collective experience of the community. As the symbolic expression of the concept of criminality running through the law of treason in the seventeenth century, the criminal mind signified the point at which matters of law and matters of fact intersected at every point revealing the fallacy of the traditional distinction and model of the trial built upon it.

The Trial of Lord Russell

The argument in this section is drawn from an interpretation of materials relating to the 1683 trial of Lord Russell for his part in the Rye House Plot, specifically those written by

Bartholomew Shower, Robert Atkyns and John Hawles, all of whom were prominent legal practitioners at the time of the trial. Despite the wealth of materials relating to many of the most prominent trials, especially those connected to the real or imagined conspiracies such as the Popish Plot, the Rye-House Plot or the Lancashire Plot that captured the public imagination, Russell's trial stands out for the unique quality of the literature it generated. Most of the pamphlets produced relating to other trials were predominantly for political consumption and as such the arguments touching on the practice and the substance of the law were mostly subsumed within polemical narratives about political issues such as the relationship between the monarchy and Parliament, the role of the common law judges and the liberty of the subject. Although the writings of Shower, Atkyns and Hawles were obviously written with quite explicit partisan political purposes, they are unique for the depth and technicality of their discussion of the legal concepts and the breadth of the authorities cited. Also, the authors were influential in both law and politics, both at the time of Russell's trial in 1683 and the period leading up to the passing of the Treason Trials Act 1696, with each variously holding prominent positions as practitioners, judges, politicians and administrators, and finding themselves occupying different positions in relation to government favour both before and after the Glorious Revolution.

Russell was indicted for high treason and brought to trial in 1683. He was charged under the Treason Act 1351 for compassing and imagining the death of the king, with the overt act, required by statute, stated as conspiring to levy war. The King's Counsel produced as evidence testimonies of meetings Russell had with other leading radical Whigs where it was alleged he had engaged in treasonous agreements in preparation for levying war. Some aspects of the evidence were uncertain, in particular how vocal Russell was in expressing his consent to what was discussed;²⁴⁶ whether Russell was present for discussions concerning a general insurrection or a seizing of the king's guards; and how advanced the plans made during these discussion were to being put into action. However, despite the assistance provided to Russell by friends and family before the trial, including letters of legal advice from Robert Atkyns, during the course of the trial itself, Russell spoke little and defended

²⁴⁶ Russell's claim in the speech given at his execution was that he was, at the most, guilty of misprision of treason: "The Speech of the Late Lord Russel" 1683.

himself weakly,²⁴⁷ rarely challenging the evidence directly but instead producing witnesses to discredit the character of those who testified against him and to speak to his own character. Russell was convicted and sentenced to death. His scaffold speech and a written sheet of paper given by him to the sheriff at his execution and later published subsequently became the focus of intense partisan political debate.

Overt-acts and treasonous minds

The debate surrounding Russell's trial centred upon identifying the basis on which Russell's conduct at the meetings was criminalised. On the one side, Shower argued that Russell's conduct at the meetings constituted an 'overt act' of conspiring to levy war that sufficiently declared a 'compassing and imagining of the king's death' under the Treason Act 1351. Shower was keen to specify what exactly the court criminalised in Russell's conviction. He insisted that it was "the imagination and compassing which is the treason... prohibited and condemned" and that the conspiring that constituted the overt-act was of itself "not the treason".²⁴⁸ Russell's conduct at the meetings was merely a "natural and genuine declaration" of the compassing and imagining the death of the king which was the genuine object of criminalisation.²⁴⁹

The motive behind affirming this distinction lay in rebutting the criticism frequently directed at the judges and king's counsel during this period that they were practicing 'constructive treason' whereby, through expansive interpretations of the law, they were criminalising an increasingly broad and uncertain scope of behaviour as treason. In general these criticisms maintained that as the actual levying of war was defined as a type of treason under a different branch of the Treason Act to the one Russell was indicted upon, by making Russell's conspiring to levy war the overt-act in the indictment the scope of the

²⁴⁷ Ibid. Russell made reference in his execution speech to "avoiding tricks"

²⁴⁸ Bartholomew Shower, "The Magistracy and Government of England Vindicated," in *A Complete Collection of State Trials*, vol. 9, n.d., 747.

²⁴⁹ Ibid., 748.

offence was in effect being expanded. By listing conspiracy to levy war as the overt-act in the indictment, those criticising the decision, backed up by an historical narrative concerning the political motives behind the passing of the original act during Edward III's reign, argued that Russell's conviction had no legal basis as Parliament's decision not to make such a conspiracy itself treason was evident in the explicitly making of the *actual* levying of war a treason. Atkyns argued along these lines that Shower "confound[ed] the several and distinct sorts and species of treason," questioning the distinction he maintained between overt-acts and the treasonous mind prohibited as it was "to make a bare conspiring and consulting to levy war...to be treason within this statute of Edw 3 which plainly this statute would not have to be so taken."²⁵⁰

Underlying the debate between Shower and his adversaries as to whether Russell's consultations could constitute an overt-act of a conspiring and imagining the death of the king were contrasting views on the nature of an overt-act itself. Shower, following from his insistence that the overt-act is not prohibited itself but merely declares the treasonous mind that is, proceeds to give a seemingly narrow definition. He defines an overt-act as "some open act of which human justice can take a conusance...for thoughts are secret, and can never be arraigned, proved, or censured, any otherwise than as they are discovered by some overt-act,"²⁵¹ and as "any open, manifest thing as can truly discover those thoughts".²⁵² The purely declaratory nature of an overt-act is emphasised further in Shower's analysis of the particular aspect of a meeting or consultation that makes it an overt-act, for it lies not necessarily in the connection of the meeting to the actual execution of a plan that would put the king's life in danger but rather "'tis but a declaration of their minds by words each to the other, only they do happen to agree."²⁵³ It is the mind that is judged treasonous rather than the meeting, for "nor can the meeting make it more so".²⁵⁴

²⁵⁰ Robert Atkyns, "The Lord Russell's Innocency Further Defended," in *A Complete Collection of State Trials*, vol. 9, n.d., 789.

²⁵¹ Bartholomew Shower, "A Second Vindication of the Magistracy and Government of England," in *A Complete Collection of State Trials*, vol. 9, n.d., 747.

²⁵² Bartholomew Shower, "The Third and Last Part of the Magistracy and Government of England Vindicated," in *A Complete Collection of State Trials*, vol. 9, n.d., 774.

²⁵³ *Ibid.*, 775.

²⁵⁴ *Ibid.*

Thus Shower presented the overt-act as a necessity that enables the treason to be discovered and tried by the court rather than intrinsic to the offence itself.

Shower's characterisation of the overt-act and its relation to the treasonous mind was challenged by his legal and political opponents. On the one hand Hawles accepted Shower's interpretation that some overt-acts "prove themselves" and were a "direct Evidence of the Intention" that was criminal. However, he identified a second type of overt-act as "not direct Evidences of the Intention; but the Intention, as well as the Overt-act, must be proved...".²⁵⁵ This second type of overt act also seemingly indicates an area of interest which does not sit easily within Shower's traditional understanding of the distinction between overt-act and the treasonous mind. From Hawles' analysis we can deduce that this object appears to occupy a space between the overt-act and the treasonous mind. This space is defined on each side first by a 'lack' identified in the nature of overt-acts that means in isolation they are insufficient to 'declare' a treasonous mind, and second by an 'excess' of the treasonous mind that apparently can be proven, but not by an overt-act in isolation. Importantly, Hawles does not suggest this second type is any less treason, even if they do leave it uncertain as to how it is to be proved.

Hawles and Atkyns, by requiring proof of the intention that the overt-act could not by itself necessarily capture had seemingly made treason prosecutions more difficult by introducing an uncertainly defined object to be proved, at least in the case of meetings and consultations of the like Russell was a part of. On the one hand this interpretation not only retained the sense that prosecution for treason, particularly things 'not actually done' was difficult as thoughts were 'secret', but exaggerated it by posing the possibility that the concept introduced to overcome this difficulty – the overt-act – was itself still insufficient with further proof of the intention required. On the other hand Atkyns could cite Coke's much revered commentaries on the law of treason that the evidential standard imported by the word 'Provablement' was that prosecution must be "upon direct and manifest proof,

²⁵⁵ John Hawles, "A Reply to a Sheet of Paper Entitled the Magistracy and Government of England Vindicated" 1689, 18.

not upon conjectural presumption, or inferences, or straines of wit..." nor, as Atkyns significantly adds, probabilities.²⁵⁶ Having argued that in the nature of treason something required proof that necessarily eluded direct corroboration by overt-facts, supporters of Russell could then cite the most authoritative writings on treason at the time to demand that proof must be direct and manifest.

The nature of this object and its impact upon legal reasoning is evident in the debate between Shower on the one hand and Atkyns and Hawles on the other as to whether an overt-act was sufficiently established in Russell's indictment, in particular the extent to which the meeting could be characterised as a 'thing done' for the purposes of an indictment for compassing and imagining the death of the king. Answering this question appeared to depend on relating Russell's actions to other future possible contingent events to bring it more firmly within the scope of high treason, with the main point of contention between the two sides being the expansiveness of this contextualisation. Atkyns argued that because Russell and others met "only to consult, agree and conclude" and that "they acted nothing in pursuance of that consulting agreeing and concluding....the meeting properly hath not the nature of an acting or action, or a thing done", and as such the indictment "sets not forth anything done at all."²⁵⁷ By narrowing the context and delinking it from future possible actions Atkyns argues that no act for the purposes of treason has properly taken place. The remoteness of the overt-act from the purpose of the law's criminalisation of compassing and imagining the death of the king is emphasised as "if the Conspiracy took effect, the Death, or Deposing the King, doth not naturally, much less necessarily follow..."²⁵⁸ The meeting can only 'declare' to the judges that they intended to consult, agree and conclude which, if the context is narrowed, are too remote to evidence a compassing and imagining the death of the king.

²⁵⁶ Robert Atkyns, "A Defence of the Late Lord Russell's Innocency," in *A Complete Collection of State Trials*, vol. 9, n.d., 723.

²⁵⁷ *Ibid.*, 726.

²⁵⁸ Hawles, "A Reply to a Sheet of Paper Entitled the Magistracy and Government of England Vindicated," 25.

Shower, on the other hand, maintained that the meeting could indeed be properly called ‘a thing done’ for the purposes of compassing and imagining the death of the king. By expanding the context beyond the immediate meeting, relating it to possible future actions in pursuance of what was agreed at that meeting, Shower argues that the meeting is an overt-act that properly expresses an intention that comes within the compassing and imagining the death of the king. In order to establish the meeting as an overt-act Shower invokes the likelihood of future possible action in pursuance of the meeting, leading ultimately to an attempt on the life of the king. Because in the meeting Russell “designs and intends the necessary means naturally conducing to a particular end” the meeting itself, even though no action was taken upon it, is a sufficient overt-act. This tactic is evident elsewhere in Shower’s argument as he relies on the closeness of the meeting to the “effecting”,²⁵⁹ “execution”,²⁶⁰ or “accomplishment”²⁶¹ of the king’s death.

The fact/law distinction

The relationship Shower envisioned between the overt-act and the treasonous mind sits comfortably with the traditional distinction between fact and law we saw the courts attempting to police in the previous section, leading to an easy distribution of roles within the court oriented around their distinction. Shower characterises the process by which the overt-act ‘discovers’ or ‘declares’ the treasonous mind in purely passive terms, suggesting that no significant interpretive activity is required in order to translate the meaning that the overt-act signifies into something that can be understood by the law. On the one hand the overt-act is capable of declaring its meaning without any necessary engagement with the law. On the other hand the law can incorporate that meaning to produce judgment without any necessary engagement with the essence of the overt-act itself. Although what the overt-act signifies and what the law receives and judges are *equivalent*, requiring no translation through interpretation in passing from one to the other, the overt-acts signifying

²⁵⁹ Bartholomew Shower, “An Antidote Against Poison,” in *A Complete Collection of State Trials*, vol. 9, n.d., 717.

²⁶⁰ Shower, “The Magistracy and Government of England Vindicated,” 748.

²⁶¹ *Ibid.*, 749.

and the law's receiving operate *in isolation of one another*. As such the tasks within the court room associated with each the overt-act and the treasonous mind can be conducted with little complication. The overt-act can be established and judged proven or not without the need for legal expertise, whereas the judgment as to guilt or innocence can be made without depending on a nuanced or contentious presentation of the overt-act.

Hawles and Atkyns' characterisation of the relationship between the overt-act and the treasonous mind and its impact upon legal reasoning sits less easy within the traditional distinction between law and fact. Whereas Shower envisioned the overt-act's signification and the law's understanding as equivalent but independent, Hawles and Atkyns envision this interaction as more nuanced and interdependent. The characterisation of the overt-act as lacking full capacity to evidence the treasonous mind appears to be rooted in the need to relate it to these other contingencies, and that it can only signify a meaning for these purposes insofar as it is. In order for Russell's meeting to signify anything it must first be related to a hypothetical range of potential future acts subsequent to that meeting. This alone is not something Shower would necessarily disagree with, but rather he would simply assert that the act of meeting itself 'naturally' declared these future contingencies, and thus were fully part of the original overt-act. However, for Hawles and Atkyns the connection between these overt-acts and other contingencies are not made in isolation from the law. Instead they are governed by an understanding of the types of behaviour that the law prohibits. The relating of Russell's meeting to these contingencies that determines its recognition as an overt-act and the meaning it signifies is governed by an impression of the concrete types of behaviour that are prohibited as compassing and imagining the death of the king. It was the differences in making this calculation that informed Shower's placing Russell's actions within a wide context and Hawles and Atkyns' attempts to narrow it.

Although Hawles and Atkyns' argument that the overt-act signifies nothing without relating it to other contingencies in a process governed by the law may undermine Shower's belief that the capacity of overt-acts to signify meaning and the capacity of law to receive it can and do operate independent of one another, it does not necessarily undermine the

second limb of his understanding: that the law can understand the meaning signified by the overt-act without any significant interpretive engagement with the facts. However, the manner in which Hawles and Atkyns envision the law governing this process seemingly does introduce a significant interpretive element that poses a challenge to Shower's analysis. Although the linking of overt-acts to these contingencies is governed by the law, as Hawles implied with his comment that both the overt-act *and* the intention must be proved, it appears the 'treasonous mind' cannot, in the abstract, be translated into a static definition of concrete overt-acts. Again the root of this inability lies in the contingencies surrounding the overt-act. The law's reception of the overt-act is marked always by the possibility that the contingencies linked to the overt-act signify a potential resolution that may alter its recognition as such. As the overt-act is always marked by a possible contingency that may have legal consequences, but which the overt-act cannot fully account for, the treasonous mind cannot in the abstract be reduced to concrete overt-acts. Instead the treasonous mind is constructed through an always-active engagement with overt-acts and their contingencies, ordering them according to the imagined purpose or policy of law. For example, law's reception of Russell's meeting as an overt-act was marked by the possibility that it was too remote from any future action taken in pursuance of what was agreed at the meeting and thus from any actual attempt on the life of the king, negating the sense that it was an overt-act of compassing and imaging the death of the king. Alternatively if it was likely that future action would be taken in pursuance of the meeting, and that was likely to be a direct levying of war, the meeting would come closer to the branch of the Treason Act dealing with the actual levying of war, in which case it was potentially best dealt with under that branch according to the purposes of good order and policy in the law. In either case the law's identification of the meeting as an overt-act was always marked by the possibility that its contingencies may be resolved so as to negate or alter its status as an overt-act.

The outcome of Hawles and Atkyns' analysis is to question the assumption underlying Shower's initial argument that the overt-acts signifying of meaning and the law's reception of meaning are independent but compatible processes. On the one hand what counts as an overt-act presumes some guidance by the law, without which it signifies nothing to it. The status of Russell's meeting as an overt-act was governed by the extent to

which the contingencies surrounding it could be calculated so as to bring it within the scope of what the law was concerned with. On the other hand identifying what the law was concerned with - the treasonous mind – presumed some engagement with overt-acts without which the law has no content through which it can guide. The court needed to relate Russell's meeting to hypothetical overt-acts associated with other offences, such as the actual levying of war, in order to properly understand it and its associated contingencies. This image of interdependence between overt-act and treasonous mind, resolved only by interpretive engagement, complicated the traditional distinction between fact and law, with the roles associated with each side of the distinction taking on a new complexity. The proven/unproven judgement associated with overt-acts involved not only their 'existence' as such, but also an interpretation of its associated contingencies that spoke to their meaning, and the guilty/not guilty judgment involved not merely locating a pre-existing fact within a self-contained law, but the active realisation of the law within the world of human activity and overt-acts.

Although Shower initially began with an understanding of the overt-act and treasonous mind in conflict with Hawles and Atkyns, by the conclusion of the debate he appears to contradict his initial position. As outlined above, in order to rebut the accusations of constructive treason levied at the courts Shower needed maintain a sharp distinction between overt-acts and the treasonous mind in order to argue that it wasn't the conspiracy to levy war itself that was being criminalised but rather the compassing and imagining the death of the king it declared. To achieve this Shower needed to argue that the concrete overt-act of a conspiracy to levy war declared a compassing and imagining the death of the king without relying on any intrinsic connection between the two. If the connection between the two was made intrinsic it would give credence to the argument that the conspiracy to levy war itself had been criminalised, which had, on the interpretation of Hawles and Atkyns, specifically not been provided for in Treason Act 1351. However, by arguing in favour of the decision in Russell's trial on the basis of the closeness of the meeting to the 'effecting' of the king's death Shower undermines the distinction he sought to maintain. In calculating these contingencies Shower effectively admits that overt-acts do not by themselves signify anything useful to the law without an interpretive

engagement with its surrounding contingences. And by giving content to the ‘treasonous mind’ through calculation of those contingences Shower effectively admits that the law presumes an active interpretive engagement with the overt-act. Thus Shower’s argument that the court in Russell’s trial did not criminalise the meeting itself but the treasonous mind it evidenced is exposed as an oversimplification by his own argument. The treasonous mind only exists to the extent to which it is evidenced by overt-acts. The firm distinction Shower needed to maintain was undermined.

Legal knowledge and proof of fact

The breakdown of the traditional rule governing the distinction between fact and law in the courts emphasises the importance of legal knowledge in the presentation of fact, not only from the perspective of ‘protecting’ the accused, but more importantly for the proper functioning of legal order. Atkyns seems to touch upon the use of legal knowledge in presenting fact when, in his review of the testimonies against Russell, he comments that evidence of Russell’s consent to the meetings – what was “the pinching proof” and the “stabbing evidence” - was given “after many questions asked” and “so much interrogation”.²⁶² A clear manifestation of Russell’s consent would militate against the narrow context adopted by Atkyns and Hawles in interpreting the meeting, suggesting a greater degree of likelihood that in Russell’s mind the intent to meet was more intimately linked to a wider ambition to execute a plan dangerous to the life of the king, thus increasing the likelihood the meeting itself would constitute an overt-act. A weak indication of consent would however have narrowed the context, it being more difficult to gauge Russell’s mind as to future actions beyond his intent to meet and discuss, weakening the sense that the meeting was an overt-act of a compassing and imagining the death of the king. Atkyns acknowledges the legal importance of this aspect of the evidence, complaining

²⁶² Atkyns, “A Defence of the Late Lord Russell’s Innocency,” 733–734.

that though the witnesses testified to Russell's consent, "by what words, or how he signified his consent, not a word, though mighty material."²⁶³

In this section I have argued that the traditional understanding of the distinction between fact and law upon which the rule against defence counsel was grounded came into tension with how the law was seen to actually criminalise behaviour. Whereas the rule against defence counsel presumed the distinction between fact and law operated with little difficulty both in the law and in the courts, a perspective reflected in Shower's initial position, the argument made by Hawles and Atkyns, and eventually adopted by Shower too, indicates an awareness of a more nuanced interaction. In particular, the latter perspective suggests that the proper functioning of legal order and legal judgment, at least in the area of treason law, presumes some interdependency between the two, marked by the need for active interpretive engagement by lawyers and judges. In this context the rule against defence counsel loses its reason within the context of the legal order as a whole. Where the contingency surrounding facts was apparent, the idea that they should be 'clear as the noon sun' was weakened, or at least its meaning changed. Moreover, as the presentation of facts became more central to the proper functioning of legal order, the dismissal of defence counsel as an 'artificial cavil' lost its vitality. A new principled basis for rethinking the role of defence counsel in the courts was emerging, not from a critique drawing upon the right to self-defence, but more immediately from tensions within the practice itself.

The analysis above suggests the emergence of new a practice in the courts, or at least the space within which a new practice could possibly operate if not yet fully realised. Accompanying the identification of this contingency between law and fact and an awareness of its importance in criminalising behaviour was a corresponding awareness of the inadequacy of traditional trial practice, as indicated in both Atkyns' assertion of the importance of legal knowledge in the presentation of facts and by evidence outlined in the previous section of the traditional distinction being occasionally undermined in actual court practice. Whereas traditional practice presumed equivalence between law and fact, this

²⁶³ Ibid., 734.

new practice presumes the necessity of their interaction. It is as an effect of this new practice that the right to defence counsel became an institutional solution, at least in the case of treason trials.

7. Conclusion

Underlying this account of the origins of the 1696 Act has been an argument concerning the general framework for interpreting the reform of criminal procedure during this period. The argument made in this chapter has been made against the background of a competing perspective characterising the establishing of procedural safeguards as the expression of a political individualism, recognising the individual as having a political or moral status that demands protection from the overbearing power of the state. The framework developed in this chapter offers a more nuanced account of how individualism operated in the court and reshaped its practices. On the one hand it questions the assumption that the reform of criminal procedure was informed by an image of the abstract individual as having identifiable political rights and interests against the state. Instead it has been argued that the origins of these procedural reforms can be traced back to problems of ordering faced by the courts in the face of increasing social diversity and complexity. The response of the courts indicates little concrete evidence to suggest that they were motivated by the political or moral status of the defendant as an abstract individual. Rather, the image that emerges is that of the defendant as the subject of social governance. The legal system, operating in the courts through its myriad of practices oriented around the immanence of law to society, is increasingly concerned with how to represent criminal behaviour and communicate it across the legal order rather than merely punishing a self-contained definition of 'criminality' found in the law. The operation of law in the courts becomes underpinned by a body of knowledge around the 'criminality' of the defendant's

behaviour, engaging with the facts and exploring their contingent meanings so as to give content to the law and enable it to efficiently order its environment.

On the other hand it has not been the purpose of this argument to dismiss individualism as a useful concept for interpreting these developments. Whilst this may not have manifested itself in the concrete protection of individual rights as Shapiro envisioned, that is not to conclude it had no individualist premises significant for an account of the reform of criminal procedure. It was the tensions within Locke's individualism expressed in the abstract state of nature that underpinned the particular historicism of institutions that we have seen inform much of the legal developments outlined in this chapter. On the one hand Locke's individualism is premised on the possibility of a mutual recognition within pre-political society of individual rights prior to entering the social contract, most commonly expressed as the right to property. On the other hand this limited agreement amongst society contains the seed of its own potential destruction as it creates the insecurity that eventually necessitates the state. This is perhaps most evident in Locke's account of the covenant for the invention of money, where individuals in the state of nature agree to create the conditions in which an insatiable accumulative spirit is unleashed, universalising the threat of conflict and necessitating the creation of the state.

This dualism informs the amorphous image of society deployed by Locke. On the one hand this agreement mutually recognising the respective interests of other individuals is the essence of society, its first coming together in history and acting as a single body, seemingly making the individual the basis of society. On the other hand this agreement contains within it the radical negation of society, the threat of incessant conflict provoked by unbounded individual accumulation that gives rise to the need to transfer political power to the state. 'Society' is thus an inherently conflicted body marked by both the possibility of a common recognition of individual rights and the inescapable threat to society's existence that this agreement poses. It is the conflicted status of this agreement making society that

ensures it escapes any objectively verifiable expression in history by any concrete political institution.

As we have seen the developments traced in this chapter are underpinned by Locke's view on the essential character of society and its articulation throughout history. The practices that emerged oriented around the immanence of law to society, such as those enshrined by the 1696 Act, spoke to the possibility of a shared representation of society. However, the initial breakdown of the distinction between law and fact and the wider breakdown in the assumption of equivalence between law and society that gave rise to these practices were informed by the inescapable possibility that any concrete representation contains the seeds of society's destruction and the insecurity the state was established to protect against. Between these two poles that made society the primary but unrepresentable subject of law was the historicism that penetrated the legal order and its practices partly enshrined by the 1696 Act.

On this analysis it would seem the impact of individualism was not so much the envisioning of a political subject possessing certain rights and interests that demand protection - a timeless abstraction with universal application which, as we have seen, figured little in the concern for procedural safeguards. Rather the individual emerges as the founding, irreducible problem of social order. Inherent to the individual's dangerous recognition that for Locke marks the beginning of society is the contingency that ruptures the timelessness and universality previously assumed by law, introducing the historicism that animates the law's turn to social ordering. Insofar as the individual stood at the heart of the Treason Trials Act 1696, it was as law's defining and inescapable problem rather than its subject to protect.

CHAPTER THREE

CUSTOM, COMMUNITY AND LEGAL ORDER: SEVENTEENTH CENTURY DEVELOPMENTS IN COMMON LAW THOUGHT

1. Introduction

The analysis of the Treason Trials Act 1696 conducted in Chapter Two brought us to two conclusions, both of which contribute to themes being developed through the thesis as a whole. The first was to challenge the notion that the reforms enshrined in the Act had their origins in a desire to defend the individual against the state by questioning the conclusions other authors drew from seventeenth century Lockean individualism for the administration of law. The second was to present an alternative hypothesis locating those reforms within wider transformations in understandings of legal order evidenced in writings on legal reasoning and legal method in which the practices through which law represents the social world increasingly come into focus in its ordering of it, as opposed to appealing to

a more 'transcendent' vision of order identified with God or tradition. Emerging from the second part of the argument in particular was a conception of abstract thought about the person in criminal law in which it operates as part of this representative function of the legal order. This chapter aims to develop a more concrete impression of the vision of legal order tentatively outlined in Chapter Two by locating it within general philosophical reflection on the nature of English law in the period from the sixteenth century up until the late-seventeenth century, identifying it in particular with the common law vision of law and legal authority. The chapter begins by identifying the vision of legal order drawn out in Chapter Two with a growing focus in jurisprudential thought on custom as a source of English law, with St Germain's notion of 'secondary reason' in his sixteenth century *Doctor and Student* acting as a bridge between the two. It is argued that appeal to the customary foundation of law and the inherent tension between the reasonableness of a custom on the one hand and its acceptance on the other as criteria in recognising its binding quality captures the dynamic between representing and ordering of the social world present in the vision of legal order under consideration.

Whilst the early part of the chapter hints at the tensions inherent to St Germain's identifying of custom as an important source of English law and the contradictory view of the practices of the King's courts that it gives rise to, the latter part explores how these tensions were dealt with as later writers, confronted by the tumultuous political climate of seventeenth century England, attempted to illuminate the nature of the common law's authority and define its place in the constitution. Two perspectives on these questions are outlined and explored; that of Edward Coke, Thomas Hedley and John Davies on the one hand, and John Selden and Matthew Hale on the other. The analysis identifies that each perspective attempts to overcome these tensions in their account of the common law's authority by presenting a particular view of its continuity throughout history, establishing a unique bond between the common law and the English people and subsequently defending its jurisdiction against Parliament and the Crown, if not asserting its superior status. It is argued that whilst both perspectives can be seen to be a response to the shift towards a focus on the customary foundations of English law generated by the emerging sense of legal order outlined, only Selden and Hale can be seen to successfully incorporate it into their

account of the common law's authority. Whereas the Cokean perspective seeks to resolve the tensions generated by this vision of legal order by invoking an understanding of the continuity of the common law as transcending change and development in society, Selden and Hale confront them directly by conceiving the continuity of the common law as constructed in and through such social processes. By locating the authority of the common law in the possibility of an abstract continuity and coherence of law which is responsive to change and development in society, and indeed presumes it, Selden and Hale give an account of the authority of those practices associated with legal order aimed at representing and ordering the social world which the Cokean perspective's transcendence cannot.²⁶⁴

Although the focus of this chapter is not on the abstract individual of modern criminal law in the sense which Chapters One and Two may have been, it develops themes important to the historical analysis conducted in the thesis as a whole. In locating the vision of legal order we identified in Chapter Two as emerging during this period firmly within a particular tradition of jurisprudential thought, namely that of the common law, we avail ourselves of important tools in reflecting further upon the nature of that abstract thought about the person which was also seen in that chapter to bear a relation to this vision of legal order. In particular, as a consequence of the argument developed in this chapter we will be able to identify the abstract individual of modern criminal law with a particular conception of the authority of law associated with the customary foundations of the common law. The significance of this can be appreciated if we think back to the conclusions we drew from the analysis of the prevailing literature conducted in Chapter One where it was seen that, although Farmer and Lacey develop an important insight into the abstract individual of

²⁶⁴ For other works exploring the historicism of common law theory and the relationship between law and custom, see Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986), chap. 1 and 2; Gerald J. Postema, "Classical Common Law Jurisprudence (Part I)," *Oxford University Commonwealth Law Journal* 2, no. 2 (2002): 155–80; Gerald J. Postema, "Classical Common Law Jurisprudence (Part II)," *Oxford University Commonwealth Law Journal* 3, no. 1 (2003): 1–28; A. W. B Simpson, *Legal Theory and Legal History* (London; Ronceverte: The Hambledon Press, 1987), chap. 15; Harold J. Berman, "The Origins of Historical Jurisprudence: Coke, Selden, Hale," *Yale Law Journal* 103, no. 7 (1994): 1651–1738; For a sociological and political analysis of the developments explored in this chapter, see respectively Richard Nobles and David Schiff, *A Sociology of Jurisprudence*: (Oxford; Portland (Oregon): Hart Publishing, 2006), chap. 3; Roger Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*, 2nd ed. (Oxford: Oxford University Press, 2003), chap. 2.

modern criminal law by highlighting its common law origins, their argument that its presence in doctrine acts as an 'ideological counterbalance' to other practices, with the implication that it seeks to legitimise practices, did not fully capture the specific nature of its normative force. Whilst the argument of this thesis is also that the origins of the abstract individual are to be located in the common law, it will be seen in this chapter that it does so with a different understanding of the common law's authority in mind, one which resists its reduction to values or sources but places it instead in practice, and so can overcome the limitations which we identified in Chapter One. We turn first however to an analysis of the criminal mind as it emerged first in the work of Coke on criminal law and then refined in the later work of Hale.

2. *Mens Rea* and Criminality

The principle *actus reus non facit reum nisi mens sit rea* was first explicitly invoked as a principle of English criminal law by Sir Edward Coke in his *Third Part of the Institutes*, published in 1669. Although the actual formulation of the principle implies generality, Coke in fact only cites it in relation to a narrow range of offences, specifically the branch of high treason concerning compassing and imagining the death of the king, *felo de se*, and larceny. Moreover, where Coke does invoke the principle the manner in which he employs it to interpret and organise the law concerning particular offences suggests a more nuanced view of its application than that which would perhaps be recognisable to the modern criminal lawyer, for whom the principle is associated with a complex set of doctrines concerning the defendant's level of foresight with regards to a prohibited consequence or knowledge of circumstances surrounding a prohibited act. As will be shown, distinguishing Coke's early treatment of the principle is the somewhat conflicted role the criminal mind invoked by the principle plays in defining the substantive boundaries of the offence. On the one hand, Coke often invokes the idea of *mens rea* as integral to the rule identifying conduct prohibited by shaping the substance of that rule, as well reaffirming the criminality entailed by its breach by reason of the evil moral disposition such a breach discloses. On the other

hand, Coke can also be seen to assign *mens rea* a more independent role more akin to more modern understandings of the principle, operating as a distinct element of the offence requiring that a specific state of mind be proven to accompany those acts otherwise prohibited by the offence. Due to the relatively unsystematic nature of Coke's treatment of the principle the uncovering of these two contrasting roles requires a large degree of analysis and interpretation of Coke's texts. However, as this section will demonstrate, there is evidence of both these views in operation in each of the offences where Coke invokes the principle of *mens rea*, often within the same short passages.

These two interpretations of the role of *mens rea* are evident in Coke's discussion of high treason, in particular that branch of high treason concerning compassing and imagining the death of the king as declared by the Treason Act 1351. Coke invokes the principle *actus reus non facit reum nisi mens sit rea* in association with the element of *fait compasser ou imaginer* in the offence, stating that "there must be a compassing or imagination, for an act done *per infortunium*, without compassing, intent, or imagination, is not within this act, as it appeareth by the expresse words thereof."²⁶⁵ The use of the principle here suggests the offence is structured by a clear distinction between internal and external elements of conduct, with the nature of compassing and imagining clearly identified with the former. Taken by itself this appears a relatively uncontroversial interpretation of 'compassing or imagination' reflecting their natural meaning. It is however largely inconsistent with the interpretation Coke gives of compassing more generally. Immediately preceding the discussion of *fait compasser ou imaginer* where Coke invokes the *mens rea* principle he interprets the meaning of *fait compasser* more narrowly, identifying the element of compassing in the offence with the maxim *voluntas reputatur pro facto* in a manner suggesting an intrinsic connection between such compassing and an overt-act tending towards the execution of a deed.²⁶⁶ Elsewhere, in the same section where Coke associates compassing and imagination with the *mens rea* principle, Coke rather paradoxically suggests that where a particular case falls outside those high treasons declared by the Act for a lack

²⁶⁵ Coke, *The Third Part of the Institutes of the Laws of England*, 6.

²⁶⁶ Fletcher suggests the connection between compassing and the overt-act in Coke's view is "conceptual and substantive" consistent with idea of manifest criminality: Fletcher, *Rethinking Criminal Law*, 207–208.

of compassing or imagining, the statute provides a remedy in assigning to Parliament the right to declare further treasons where “[t]his compassing, intent, or imagination, though secret, is to be tried by the peers, and to be discovered by circumstances precedent, concomitant, and subsequent, with all endeavour evermore for the safety of the king.”²⁶⁷ This passage again suggests that compassing and imagining do not in Coke’s view refer to a particular state of mind in relation to a prohibited consequence but form part of an attempt to describe and evaluate conduct deemed criminal which does not draw prominently upon a distinction between the internal and external aspects of that conduct. In this second interpretation it appears the notion that compassing and imagining formed a formally distinct condition of liability referring to the accused’s state of mind was far from present in Coke’s thoughts.

It can be seen that surrounding Coke’s invoking of the *mens rea* principle in compassing the death of the king are two different interpretations of compassing itself; one gesturing towards compassing as a distinct element of the offence referring the accused’s state of mind and another locating it as part of a broader description of conduct. A similar tension surrounding the *mens rea* principle can also be seen in Coke’s discussion of *felo de se*. Coke invokes the principle in relation to the requirement that the accused be *compos mentis* at the time the fatal injury is inflicted, stating in particular that where the accused whilst *non compos mentis* gives him or herself a mortal wound, yet “when he hath recovered his memory, dieth” the principle limits liability “because, the stroke which was the cause of his death, was given when he was not *compos mentis*.”²⁶⁸ On the face of it this proposition is a relatively uncontroversial application of the rule that those deemed *non compos mentis* could not to be convicted and punished, the authority of which Coke reinforces by invoking the *mens rea* principle. Coke’s approach here is worthy of note since he includes *compos mentis* as part of the substantive definition of the offence, in contrast to its more common role as a general rule against subjecting those *non compos mentis* to the criminal process more generally. One potential explanation for Coke’s inclusion of *compos mentis* as a substantive element of the offence, which may shed some light upon why he

²⁶⁷ Coke, *The Third Part of the Institutes of the Laws of England*, 6.

²⁶⁸ *Ibid.*, 54.

associates it with the *mens rea* principle, lies in comments he makes on the underlying reason for the rule against trying and punishing the *non compos mentis* in his report of *Beverley's Case*. Coke sees the reason of the rule from two perspectives. The first states that the punishment of those *non compos mentis* as felons, being "so grievous", is intrinsically unjustified as it "cannot be an example to others",²⁶⁹ a view echoed in the *Institutes* where he describes the punishment of a "mad man" as "a miserable spectacle, both against law, and of extreame inhumanity and cruelty, and can be no example to others."²⁷⁰ The second reason states that "No felony or murder can be committed without a felonious intent and purpose...but *furiosus non intelligit quid agit, et animo et ratione caret, et non multum distat a brutis*, as Bracton saith, and therefore he cannot have a felonious intent."²⁷¹ These reasons address two different issues in criminal law, the first focusing upon the conditions of just punishment and the second concerning the nature of criminality itself. Whilst the first may shape the substantive criminal law only indirectly, the second focuses on the nature of felonious conduct as involving some form of intent or purpose, with the *non compos mentis* lacking capacities of reason and understanding deemed *prima facie* incapable of committing felony. This being the nature of felonious conduct it can be taken as a leading presumption that elements of intent or purpose form some part of the definition of all individual felonies. It would seem then that by including the requirement that the accused be *compos mentis* as part of the actual definition of *felo de se* Coke attempts to bring forward an element of the offence referring directly to the accused's state of mind, whilst not necessarily defining a particular state of mind as such, and inviting the association with the *mens rea* principle on that basis.

Including that the accused be *compos mentis* as part of the substantive definition of the offence may signal an understanding on the part of Coke of a distinction between internal and external aspects of conduct constituting the offence. Similar to what we have seen in relation to his interpretation of compassing or imagining, however, it is not possible to easily draw such conclusions. After stating the general rule that one who kills him or

²⁶⁹ Sir Edward Coke, *The Reports of Sir Edward Coke*, ed. George Wilson, vol. 2 (Dublin: Printed for J. Moore, 1793), 124.

²⁷⁰ Coke, *The Third Part of the Institutes of the Laws of England*, 6.

²⁷¹ Coke, *The Reports of Sir Edward Coke*, Kt. [1572-1617], 1793, 2:124.

herself whilst not being *compos mentis* is not *felo de se*, Coke reasons that “for, as he cannot commit murder upon another, so in that case he cannot commit murder upon himself.”²⁷² The suggestion that the rule against convicting those deemed *non compos mentis* bears similarly upon cases of murder and *felo de se* stands somewhat in tension with the recognition of a distinction between internal and external aspects of conduct entailed by incorporating *compos mentis* into the formal definition of *felo de se*. On the one hand the proposition is, of course, perfectly sound – where the accused is *non compos mentis* the law would prohibit conviction for killing another just as much as it would for killing oneself. On the other hand, however, it overlooks the different reasons that may be invoked to support the rule against convicting those considered *non compos mentis* as outlined in Coke’s report on *Beverley’s Case*. Coke’s definition of the ‘malice prepensed’ of murder as “when one compasseth to kill, wound, or beat another, and doth it *sedato animo*” may suggest he conceived this element of the offence as stipulating a particular state of mind.²⁷³ But in presenting the law in this area his analysis draws upon judgments as to the broader moral quality of the killing disclosed by its surrounding circumstances. The features of the circumstances surrounding a killing which Coke highlights and which give substance to the notion of malice – such as the means used to effect the death, a sudden falling out between the accused and the victim, provocation by the victim, or the identity of the accused or the victim – appear to rely upon shared moral standards rather than what they disclose about the actual state of mind of the accused.²⁷⁴ It is difficult therefore to see how, with regards to murder, Coke could conceive the rule against convicting someone deemed *non compos mentis* applying by reason of the accused’s presumed inability to commit the offence by virtue of his or her incapacity to form any intention or purpose, as the state of mind of the accused conceived so abstractly does not otherwise feature prominently in his view of the nature of murder. It seems in this connection he draws with murder Coke must draw upon a sense of the reason of the rule against convicting the *non compos mentis* rooted in a judgment of the intrinsically immoral nature of subjecting them to the criminal process more generally. Similar to what has been outlined in relation to compassing the death of the king above, we see that in *felo de se* is a tension between on the one hand the principle

²⁷² Coke, *The Third Part of the Institutes of the Laws of England*, 54.

²⁷³ *Ibid.*, 50.

²⁷⁴ *Ibid.*, 50–52.

being invoked to interpret the element of *compos mentis* as referring to the state of mind of the accused and therefore introducing a distinction between internal and external aspects of conduct into the substance of the offence, and the on the other hand the principle being invoked as the basis for a judgement more contextual in nature, placing the conduct described by the offence within the broader moral function of the criminal law.

This same tension can be seen in his discussion of larceny, the third offence where Coke invokes the *mens rea* principle. Coke begins his discussion of felonious taking, the first element in his definition of larceny, by invoking the *mens rea* principle as the reason of the rule that the taking “must be felonious, *id est, cum animo furandi*...And this intent to steal must be when it cometh to his hands or possessions: for if he hath the possession of it once lawfully, though he hath *animo furandi* afterward, and carrieth it away, it is no larceny”.²⁷⁵ The passage reflects the well-established view of the distinction between a criminal taking deserving of punishment and non-criminal taking giving rise to civil remedy only ultimately resting on whether the taking was *animo furandi*. Moreover, the existence of *animo furandi* was not to be established by evaluating the accused’s general dealing with the property over a period of time, but at the moment the property came into his or her hands, meaning in principle two takings could to all external appearances be identical, yet one may be criminal and the other not according to whether the accused possessed an intent to steal or not. The view of larceny which Coke articulates here with which he identifies the *mens rea* principle therefore reflects a clear distinction between an internal aspect of conduct as the intent to steal and external aspect of conduct as the taking from possession. Again, however, this view does not work its way into the Coke’s more general treatment of the law. Despite the presence of an intent to steal marking the boundary between criminal and non-criminal takings, Coke’s discussion of it is remarkably brief and unilluminating, not figuring as a discrete element of the offence but forming part of a section illustrating the nature of ‘felonious taking’ more generally where the notion ‘actual taking’ is illustrated by evaluating the wider circumstances surrounding different types of dealings with property to determine what types of ‘takings’ actually constitute lawfully acquired possession. The

²⁷⁵ Ibid., 107.

inclusion of intent to steal as part of the more general element of 'felonious taking' blurs the distinction between internal and external aspects of conduct which reference to the state of mind of the accused initially gestures towards, presenting it instead as part of a broader and more contextual evaluation of dealings with property determining whether they display the character of an unlawful taking from possession.

It has so far been shown that a certain ambiguity surrounds Coke's invocation of the criminal mind in relation to high treason, *felo de se*, and larceny. On the one hand, the idea of a distinction between internal and external aspects of conduct without doubt informs part of his understanding of these offences. His invocation of the *mens rea* principle to explain the rules against convicting accidental acts in high treason for lack of compassing, requiring the accused be *compos mentis* in *felo de se* and that taking from possession coincides with an intent to steal in larceny all suggest that the state of mind of the accused as distinct from his or her acts or consequences of those acts as a part of the substance of the offence. However, although Coke makes the criminal mind part of the formal definition of these offences it does not take on the character of distinct element which is itself subject to detailed definition and analysis. The lack of conceptual distinction between compassing and overt-acts in high treason, the association of *compos mentis* with the *malice prepense* of murder in *felo de se* and the treatment of intent to steal as part of the character of a felonious taking in larceny equally suggest that the criminal mind formed part of a wider evaluation of a general pattern of conduct described as compassing, killing or taking in which the distinction between its internal and external aspects was not central and did not constitute a formally distinct condition of criminal liability. From Coke's treatment of *mens rea* we are left with the impression that the state of mind of the accused plays an important part in criminalising certain types of conduct, but gives us relatively little insight as to why this was the case – an important question when it is considered that despite the generality implied by the formulation of the *mens rea* principle the extent of its actual recognition was limited.

In his discussion of the three offences we have looked at Coke gestured towards a new perspective on the criminality these offences embodied, as symbolised by his invocation of the criminal mind. However, his treatment of the criminal mind itself was often brief and undeveloped. As we will now see, Hale was more thorough than Coke in this respect, and as a result we begin to get a clearer picture of the sense of criminality associated with the notion of the criminal mind as an element of these offences.

In certain passages Hale appears to be stronger than Coke on the place of the criminal mind at the core of the offence. For example, in relation to high treason by compassing or imagining the death of the king, Hale weakens the conceptual connection Coke made between compassing and the overt-act, breaking from Coke's method of associating compassing with the maxim *voluntas reputatur pro facto* defining it instead as a "purpose or design of the mind or will" and "an internal act"²⁷⁶. In relation to larceny although Hale retains Coke's definition of the offence and largely follows Coke's method in discussing its different elements, he diverges from Coke in his discussion of a felonious taking. Whereas Coke did not elaborate upon what was meant by intent to steal in much detail and instead buried it within a discussion on the nature of a taking from possession in general, Hale makes a clearer distinction between a taking and the state of mind accompanying it by assigning the discussion of each to separate sections. Moreover, at the beginning of his discussion of the requirement of the felonious intent, Hale again invokes the state of mind of the accused as fundamental to determining the boundaries of the offence, arguably in stronger terms than Coke did, stating that "it is the mind, that makes the taking of another's goods to be a felony, or a bare trespass only."²⁷⁷

Such passages may indicate that Hale recognised the distinction between internal and external aspects of conduct more consistently than Coke and that he was moving towards making the state of mind of the accused a formally distinct condition of liability. Whilst viewed abstractly these comments may indicate a major innovation in the

²⁷⁶ Hale, *The History of the Pleas of the Crown*, 1:107.

²⁷⁷ *Ibid.*, 1:508.

conceptualisation of these offence, the wider context of these comments show their actual effect on the law to be rather more conservative. Hale may have defined the compassing at the core of compassing or imagining the death of the king as an ‘internal act’, but Coke’s view of a conceptual and substantive connection between compassing and the overt-act enters by the back door when he immediately follows that “without something to manifest [the compassing or imagining] it could not possibly fall under any judicial cognizance” and therefore the overt-act is required to “render the compassing or imagining capable of a trial and sentence by human judicatories”.²⁷⁸ With regards to larceny, although Hale placed discussion of felonious intent in a separate section, apart from repeating the rule that a taking under the pretence of title is not larcenous little light is shed upon what in substance the law recognised as a felonious state of mind. Instead Hale again highlights how “the intention and mind are secret” and as such “must be judged by the circumstances of the fact”.²⁷⁹ The suggestion made by Hale that where one servant takes his masters horse to ride and returns it and another who sells it, a distinction can be made on the basis that in the latter case the selling “is declarative of his first taking to be felonious, and *animo furandi*” risks abandoning the promise carried by invoking the criminal mind of a sharp distinction between internal and external conduct as conditions of committing the offence, and instead makes the criminal mind part of an evaluation of the general conduct of the accused in which this distinction is not necessarily central.

Hale’s treatment of the criminal mind may therefore be seen as a measured development upon Coke’s. Whilst Coke introduced the notion of the criminal mind into these offences, it was often buried within discussion of the details of other elements of the offence. Hale extracted the notion of the criminal mind from these discussions and located it as a distinct element within the general structure of these offences, often hinting towards conceptualisations of such offences in which the state of mind of the accused formed a distinct condition of liability. The radical consequences this would have on an interpretation of the law were tempered however by frequent invocation of the ‘secret’ quality of the mind, bringing his general conceptualisation of the offence closer to the actual state of the

²⁷⁸ Ibid., 1:107.

²⁷⁹ Ibid., 1:508.

law generated by a practice where a clear distinction between internal and external aspects of conduct had had little purchase. Whilst the emphasis upon the criminal mind in the general structure of these offences may have had conservative implications for describing and analysing the substantive law, Hale nevertheless opened up another dimension to these offences which largely escaped Coke's attention. In particular, Hale presents evidence as to the accused's state of mind as essential to the interpretation and application of the substantive rules identifying the types of conduct these offences prohibited.

In relation to high treason by compassing or imagining the death of the king, although Hale does not go so far as to present compassing conceived as an abstract state of mind as a distinct condition of liability, evidence of the accused's state of mind is nevertheless invoked as in certain circumstances essential to supporting the sufficiency of the overt-act laid in the indictment. For example, where Coke largely reasserts the well-established doctrine that words by themselves could not make high treason nor serve as a sufficient overt-act of compassing and imagining the death of the king, Hale goes further in clearly identifying how words could play a role in proving the offence, such words being able to "expound an overt-act...which overt-act possibly of itself may be indifferent and unapplicable to such an intent...[words] may be joined with such an overt-act, to make the same applicable and expositive of such a compassing".²⁸⁰ This view that the determination of certain types of conduct as overt-acts draws upon evidence of the accused's state of mind emerges also in Hale's discussion of conspiracy to levy war or the actual levying of war against the king as overt-acts of compassing the death of the king. Whilst Hale maintains that as a matter of law such conduct constitutes a sufficient overt-act, he draws attention to the possibility that in proving such overt-acts a distinction may appear between planned or actual attacks which are wars against the king "merely by interpretation and construction of law," and thus not properly within the offence, and those "directly against the king or his forces".²⁸¹ Moreover, the distinction arises upon evidence of the particular purpose of the accused, between what Coke described in a different context as a pretence which is "publick

²⁸⁰ Ibid., 1:115.

²⁸¹ Ibid., 1:123.

and general” and “private in particular.”²⁸² As a matter of law a conspiracy to levy war or an actual levying of war against the king may constitute an overt-act of compassing the death of the king, but in proving that overt-act before the court it may “upon evidence...be disclosed to be only to the purpose aforesaid, and so only an interpretive or constructive levying of war.”²⁸³

In his discussion of *felo de se*, Hale’s treatment of the requirement that the accused be *compos mentis* mostly mirrors Coke’s. However, where Coke and Hale’s discussions do diverge indicates an attempt by Hale to clarify the role of this requirement as drawing upon evidence of the accused’s state of mind in supporting the interpretation and application of the rule against self-killing. First, Hale omits the association Coke makes between the rule against convicting the *non compos mentis* of *felo de se* and murder, suggesting that Hale perceived more clearly than Coke that the reason behind the rule in *felo de se* did not draw directly upon the intrinsic immorality of their punishment, but that their being *non compos mentis* formed grounds to presume the accused lacked the state of mind necessary to commit the offence. Second, Hale includes a passage on the nature of *non compos mentis* with has no obvious equivalent in Coke’s discussion, in which he states that “It is not every melancholy or hypochondriacal distemper that denominates a man *non compos*, for there are few, who commit this offense, but are under such infirmities, but it must be such an alienation of mind, that renders them madmen or frantic, or destitute of the use of reason.”²⁸⁴ It is notable that this passage does not attempt to define *non compos mentis* - which Hale takes up in a separate chapter at the beginning of the treatise²⁸⁵ - giving no firm direction as to whether ‘melancholy or hypochondriacal distemper’ does or does not satisfy the threshold of *non compos mentis* or not. Rather, in bringing forward the state of mind of the accused the passage draws attention to certain common features of the circumstances surrounding self-killing and outlines how this evidence bears upon interpreting and applying the rule against such conduct.

²⁸² Coke, *The Third Part of the Institutes of the Laws of England*, 9.

²⁸³ Hale, *The History of the Pleas of the Crown*, 1:123.

²⁸⁴ *Ibid.*, 1:412.

²⁸⁵ *Ibid.*, vol. 1, chap. 4.

The perception of the state of mind of the accused as an evidential rather than substantive matter is present also in Hale's discussion of larceny. As already noted above, in his discussion of the felonious intent required to commit larceny Hale adopts a style resembling a guide to assessing the circumstances commonly surrounding a taking rather than an attempt at definition, noting that "the intention and mind are secret" and as such "must be judged by the circumstances of the fact" before sketching those facts which "regularly and ordinarily...direct in this case."²⁸⁶ The reluctance to give firm rules or definition as to the state of mind required to commit larceny is captured by Hale's disclaimer at the end of the section in which he warns "it is impossible to prescribe all the circumstances evidencing a felonious intent" and that such questions "must be left to the due and attentive consideration of the judge and jury".²⁸⁷

Reference to the accused's state of mind as a component of criminal conduct, initially introduced by Coke in the form of the *mens rea* principle and later expanded upon by Hale, can be seen to perform a specific role in relation the general conceptualisation of the offences concerned and the sense of criminality they embodied. On the one hand, neither Coke nor Hale go so far as to clearly identify proof of a mental element as a formally distinct condition of liability. Whilst there are passages indicating that both possessed a general view of each offence as containing a specific mental element, the sense that the mind is 'secret' continued to exert a strong influence. Compassing may be an internal act, but without an overt-act it escapes judicial cognizance. Only those capable of forming felonious intentions and purposes can be *felo de se*, but this only requires they are not *non compos mentis* rather than possessing a particular intent or purpose. Possession of a felonious intent may be necessary to commit larceny, but the circumstances in which it may manifest itself are so various it escapes reduction to clear definition. Neither makes much explicit attempt to define this mental element in terms of particular states of mind, nor does

²⁸⁶ Ibid., 1:508–509.

²⁸⁷ Ibid., 1:509.

the idea of a distinction between internal and external aspects of conduct play a central role in their presentation and analysis of the substantive law generally.

The state of mind of the accused does, however, impose itself upon the workings of each offence in a different sense. Whilst substantive rules defining the conduct prohibited by each offence did not consistently divide conduct into internal and external aspects, the accused's state of mind presented evidence integral to the interpretation and application of these rules. Where the purpose of rioters were evidently private rather than public there cannot be said to be an overt-act of levying war against the king declaring a compassing of the king's death. Where the accused displayed signs of such distress as to be incapable of the use of reason there cannot be said to be a 'self' present in the self-killing. Where the accused deals with property in an outwardly open and honest manner describing such dealing as a 'taking' would distort the proper meaning of the term. Evidence presented of the state of mind of the accused was drawn upon in working out and identifying the contours of the conduct prohibited by the rule, and therefore shaped the substantive scope of the rule itself. To speak of the internal aspect of an offence being present without the external or vice-versa within a given set of circumstances would be a distortion of Coke and Hale's views on the role of this distinction in these offences insofar as it assumes these elements are identifiable prior to the process of interpreting and applying of the rule where these two elements combined to realise before the court the nature of such criminal conduct. The distinction did not presuppose the rule or possess a certain shape independent of it, but was worked out immanently to the process of interpreting and applying the rule in the courts.

This section has so far illustrated the emergence of the accused's state of mind as a component of certain key offences, first invoked by Coke as an expression of the principle *actus reus non facit reum nisi mens sit rea* and later developed upon in more systematic fashion by Hale. In doing so an attempt has been made to highlight the role played by the notion of the criminal mind in shaping the substantive scope of these offences, arguing that for these authors the state of mind of the accused was not a formally distinct condition of

liability and as such the subject of independent definition and analysis, the sense in which it tends to be understood today. The criminal mind played a more ill-defined but by no means less important role in drawing attention to certain features of circumstances commonly surrounding the type of conduct *prima facie* prohibited by the offence and drawn upon as evidence aiding interpretation of the rule in identifying its proper scope of application.

It remains to locate the analysis conducted in this section clarifying the nature of the criminal mind in the works of Coke and Hale within the argument developed in the rest of the chapter. It will be seen that the rest of the chapter attempts to bring forward the key elements of the general theory of law contained in late-sixteenth and seventeenth century writings on the nature of the common law put forward by Coke and Hale amongst others, illuminating the distinctive historicism of these theories in envisioning the customary nature of law. An important component of this argument is that such theories represented an attempt to present a rational, coherent and systematic view of law in which the interpretation and application of general and abstract rules was coming to be seen as a defining feature of its practice. The argument maintains therefore that at the heart of seventeenth-century contributions to common law theory was an attempt to grapple with and elucidate the nature of legal rules themselves. It is on this point that the analysis of this section connects with that in the rest of the chapter, and on this point that the chapter contributes to wider argument being developed in the thesis on the concept of criminality embodied by the criminal mind.

To illustrate this connection it is necessary to direct our attention to the particular character of the offences analysed in this section. It will be recalled that Coke invoked the *mens rea* principle only in relation to a narrow selection of offences – compassing the death of the king, *felo de se* and larceny. Nowhere in the *Institute* does Coke specify why this is the case, and nor is there anything in the content of Coke's analysis to suggest why the principle was perceived to have particular weight in relation to those offences. In the final part of this section I want to suggest that these offences are distinctive insofar as they are, more so than any other offence, defined in the form of abstract and general rules. In

contrast to the canon of traditional common law offences in which the substantive scope of the offence in principle corresponded with that which was manifestly criminal, at the core of the offences discussed in this section were interests identified and defined by the law and protected from interference by general and abstract rules. In contrast to the growing body of statutory offences, the offences discussed in this section despite taking the form of general and abstract rules did not rely on the somewhat uncertain authority of imposition.

This argument in connection with compassing the death of the king has already been made in Chapter Two, where it was shown that the doctrine of constructive treason placed the authority of the king as head of state as a legally protected interest at the core of the offence, and furthermore that Hale's interpretation of the offence represented an attempt to consistently weave this rationale throughout its key elements. In relation to *felo de se*, social histories of suicide have revealed that the traditional cultural attitudes viewing suicide as a heinous crime and which formed the basis for the rigorous enforcement of its punishment were beginning to break down by the mid-sixteenth century, in turn transforming perceptions of its criminality. In tracing the connection between the increasing occurrence of *non compos mentis* verdicts by coroner's juries and the secularisation of suicide in the intellectual and cultural norms of English society from the mid sixteenth century up until the turn of the nineteenth century, Michael MacDonald has argued that "[c]ontemporary beliefs about suicide were transformed utterly between 1660 and 1800, and so were official responses to it,"²⁸⁸ and that following the Civil War "[j]udicial and ecclesiastical severity gave way to official leniency and public sympathy for most people who killed themselves," and that the "savagery of the traditional reaction to suicide was mitigated by the increasing suspension of the law on a case-by-case basis".²⁸⁹ The change in popular conceptions of suicide in combination with sympathy for the family of the deceased frustrated the strict application of the law according to which the goods of the deceased were to be forfeited to the king and their immediate lord. Prior even to the softening of views on the heinousness of suicide there was "[r]esentment of the right of the crown and

²⁸⁸ Michael MacDonald, "The Secularization of Suicide in England 1660-1680," *Past and Present* 111 (1986): 52; See also Michael MacDonald, "The Medicalization of Suicide in England: Laymen, Physicians, and Cultural Change, 1500-1870," *The Millbank Quarterly* 67 (1989): 69-91.

²⁸⁹ MacDonald, "The Secularization of Suicide in England 1660-1680," 58.

lesser lords to seize the goods of self-murderers was long-standing by 1660.”²⁹⁰ Emerging from these accounts is a picture that although the criminality of *felo de se* may have traditionally been strongly felt by the community, by the mid-sixteenth century these attitudes were beginning to break down, compounding difficulties officials already faced in enforcing legally-proscribed sanctions. Although by no means conclusive, this tension between popular conceptions of the criminality of *felo de se* and official status as a crime may go some way to explaining why at the beginning of his discussion of the offence Hale takes the unusual step of asserting the nature of self-killing as a crime against the king, stating that “No man hath the absolute interest of himself, but....The king hath an interest in him, and therefore the inquisition in the case of self-murder is *felonice*...”²⁹¹

In contrast to *felo de se*, that the criminality of larceny was in part constituted by the interference with a legally protected interest had firmer roots in the law by the seventeenth-century. Although the dearth of criminal law treatises from the end of the fourteenth-century up until the publication of Coke’s *Institutes* in the early seventeenth-century make tracing transformations in the general conception of larceny difficult, a comparison between the earlier treatises and Coke’s reveals that whilst the earlier treatise-writers viewed the boundaries between larceny and cognate offences such as robbery and burglary as somewhat imprecise, by the time Coke wrote the distinctiveness of larceny as an offence against the right of property was well-established, reflected in his separate treatment of these offences. *Britton* for example, when outlining proceedings in connection with the stealing of goods where the accused is “freshly pursued for the same” principally refers to such cases as ‘robbery’, not differentiating conduct interfering with the property interest from the implied violence of robbery.²⁹² Whilst the definition of larceny in the *Mirror of Justices* in many respects foreshadows the modern one,²⁹³ the subsequent illustration of its instances encompasses such a broad scope of conduct comprising not only burglary and robbery but also various frauds and breaches of trust that the principle concept of the offence appears to be the amorphous notion of ‘treachery’ prominent in the

²⁹⁰ Ibid., 70.

²⁹¹ Hale, *The History of the Pleas of the Crown*, 1:411.

²⁹² Francis Morgan Nichols, trans., *Britton*, vol. 1 (Oxford: Clarendon Press, 1865), 55–62.

²⁹³ Stephen, *A History of the Criminal Law of England*, II:134.

initial definition.²⁹⁴ Moreover, in cases lacking the elements of violence or treachery the criminality of which were manifest, appeals took on a private character with the aim of restoring stolen goods to their rightful owner or securing damages rather than proving criminality and punishing the accused.²⁹⁵

Although the conditions in which the law of larceny would come to be viewed as a crime against a legally protected interest in property may have originally been established by its inclusion by Henry II amongst the pleas of the crown to be prosecuted by indictment,²⁹⁶ the core doctrines which would come to define that law took shape in the period following these earlier treatises. In tracing the development of these doctrines Fletcher has argued that the importance attached to the unlawful taking from possession reflects the origins of the offence in the earlier law of *furtum manifestum* in which as we have seen the boundaries between larceny, robbery and burglary were indistinct, suggesting that the requirements of that law that the thief “had to tread on a significant boundary and enter a forbidden area” and “manifest a form of behaviour that could readily be identified as thieving...underlay, shaped and guided the common law of larceny”.²⁹⁷ Fletcher’s account of the development of the modern law of larceny is persuasive and an invaluable tool for analysing its enigmas and complexities. However, the focus on continuity in the law risks underplaying the aspect of change and innovation. Whereas the boundaries of person and dwelling recognised by the law of *furtum manifestum* were fully transparent to the community investing them with moral sanctity, the breach of which manifesting criminality in the truest sense possible, the boundary of possession in the modern law of larceny is marked by artificiality and legal construction, operating at a degree removed from the moral experience of the community. As Holdsworth has outlined, the modern law of larceny developed hand-in-hand with the theory of possession being elaborated in the courts more generally, where possession was coming to be viewed less as an immediately recognisable state of affairs concerning actual physical control over property and the circumstances in

²⁹⁴ William Joseph Whittaker, ed., *The Mirror of Justices* (London: B. Quaritch, 1895), 25–28.

²⁹⁵ Holdsworth, *A History of English Law*, 1923, III:319–328; Pollock and Maitland, *The History of English Law before the Time of Edward I*, II:517–523.

²⁹⁶ Holdsworth, *A History of English Law*, 1923, III:260.

²⁹⁷ Fletcher, *Rethinking Criminal Law*, 76–90.

which that control is exercised, but as an abstract concept interpreted through the prism of different rights and interests that various parties could hold in property.²⁹⁸ The doctrine of unlawful taking from possession upon which the distinctiveness of larceny from burglary and robbery took particular form can therefore be seen not only to embody a concept of manifest criminality reaching back to the roots of the offence in the law of *furtum manifestum*, but, importantly, also a reflection of the fact that the criminality it embodies is constituted in part by the protection of a legally identified and defined interest in property at the core of the offence.

From the analysis of the emergence of the criminal mind in the works of Coke and Hale conducted in this section it has been shown that it was specifically associated with a sense of criminality which was in part constituted by the breach of general and abstract rules prohibiting conduct interfering with interests identified and defined by the law. Furthermore, it has been shown that Coke and Hale did not envision the criminal mind as a formally distinct condition of liability which needed to be proven independently of rules describing the external aspects of criminal conduct, but instead that reference to the criminal mind drew attention to evidence that was to be drawn upon in determining the precise contours of that conduct identified and described by these rules. The criminal mind as envisioned by Coke and Hale can therefore be seen as a fundamentally interpretive concept, sitting at the juncture of the attempt to describe criminal conduct in the form of general and abstract rules and the interpretation and application of those rules in light of evidence presented before the court concerning the particular defendant standing before them. This view of the criminal mind as an interpretive concept brings out the sense in which it was specifically associated with an order of criminal law increasingly comprised of general and abstract rules and a sense of criminality which was in part constituted by interference with interests which were identified and defined by the law. However, as the evidential role of the criminal mind in interpreting and applying these rules suggests, these rules did not take on the character of a straightforward imposition. Rather, as the evidential

²⁹⁸ Holdsworth, *A History of English Law*, 1923, III:351–366.

role of the criminal mind in interpreting and applying these rules suggests, their specific shape and substance were in part developed through the practice of the courts.

The criminal mind as envisioned by Coke and Hale did not therefore express a concept of criminality rooted in advertent interference with interests identified and defined by the law and protected by the imposition of general and abstract rules prohibiting conduct interfering with them. Rather, the criminal mind as evidence to be drawn upon in the interpretation and application of these rules was fundamental to the process by which the conduct described by those rules was given specific shape and substance. In other words it spoke directly to the capacity of these rules to capture and describe conduct the criminality of which resided in part in interference with interests identified and defined by the law. The rest of this chapter will place this sense of the criminal mind within a wider context of developments in legal thought in the late-sixteenth and seventeenth centuries, first by showing how interpretation of general and abstract rules became an increasingly prominent aspect of legal reasoning as a sense of law as an artificial representation of the natural and social order grew, and secondly to locate this view of legal order within common law theories on the nature of law in general, drawing upon it to explain the historicism of these theories and the view of the customary foundations of the law distinctive to such theories. In doing so it will be shown that the criminal mind and the abstract individual which it embodies can be specifically associated with a common law view of law not as imposed upon the community but realised as part of the life of the community through the interpretive practices of the courtroom, the abstract individual itself being a symbolic expression of the sense of criminality entailed by this view of the nature of law.

3. The Generality of Law and Legal Order

In this section it will be shown how the order and systematic nature of law increasingly came to be seen as comprised of general and abstract rules and the place of

interpretive practices within this order. Starting by outlining the traditional perception of the law's overall coherence located in the existence of general principles that run throughout it, the challenge posed by an emerging perception of uncertainty in the common law will be traced that pictures society as comprising an increasingly incomprehensible diversity. It will be seen that accompanying the challenge posed by this diversity is a reimagining of how the 'order' envisioned by law is created, as well as the relation between law and fact in the practice of legal reasoning as the 'representative' dimension of law is emphasised. At stake in these developments is the general and abstract quality of law. As the assumption of equivalence between legal order and social order is broken down, the general and abstract postulates of law take on a new character, no longer assumed to be timeless and self-contained but always in an immanent relationship to the social environment in which they are realised.

The common law system: general rules and individual cases

The emphasis of the common law upon its own development through individual cases was considered a virtue by its advocates. It was considered a strength that in practice the common law was, in Bacon's words, to "keep close to particulars."²⁹⁹ The common law was perceived as a pragmatic instrument of governance, finely tuned to solving the day-to-day problems encountered throughout English society. It lived in and through the activity of the courtroom, venerating the argumentation and deliberative reasoning of experienced practitioners dealing with concrete day-to-day problems, and in contrast regarded with suspicion the speculation of philosophers that sought to systematise the law by reducing it to lifeless, disembodied abstract postulates.

²⁹⁹ Francis Bacon, "A Proposition to His Majesty Touching the Compiling and Amendment of the Laws of England," in *The Works of Francis Bacon, Baron of Verulam, Viscount St. Alban, and Lord High Chancellor of England*, vol. 2 (D. Midwinter, W. Innys, D. Browne, C. Davis, J. and R. Tonson, A. Millar and J. Ward, 1753), 177.

However, pride in the common law's pragmatic qualities did not translate into a disregard for its overall coherence. On the contrary, common lawyers, as advocates of any system would, prided themselves on the certainty of their law as evidence of its superior reason. The ability to direct one's mind to the particular problem in the context of the general tradition of the law was the hallmark of the expert practitioner. Coke considered that "[n]o man can be a complete lawyer by universality of knowledge without experience in particular cases, nor by bare experience without universality of knowledge; he must be both speculative and active..."³⁰⁰ Bacon criticised those that "...argue upon general grounds, and come not near the point in question; others, without laying any foundation of a ground or difference or reason, do loosely put cases, which, though they go near the point, yet being put so scattered, prove not; but rather serve to make the law appear more doubtful than to make it plain."³⁰¹ Doddridge similarly envisioned a reflexive style of reasoning in law, going from "the particular to the special, and from the special to the general" up to a "principal and primary position or notion" before descending back from these to "more special and peculiar Assertions, descending even to every particular matter."³⁰²

Although it was in the common law's method of navigating between the general and the particular, the speculative and the active, that its superiority was perceived to lie, the source and method of this uniformity was often contested and, consequently, so was the relation between individual cases and judgements and the overall body of the common law. Coke zealously guarded the unwritten nature of the common law. Its superior reason was developed through centuries of wisdom and experience in the king's courts and could be encapsulated in a single, authoritatively binding judgment just as little as it could be reduced to a single treatise. Referring to the decisions collected in "our Year Books, and Records yet extant for about these Four Hundred Years" Coke denied them an unquestionably binding quality, claiming they "are but Commentaries and Expositions of those Laws, original Writs,

³⁰⁰ Quoted in Michael Lobban, *A Treatise of Legal Philosophy and General Jurisprudence: Vol 8: A History of the Philosophy of Law in the Common Law World, 1600-1900*. (Springer, 2007), 31.

³⁰¹ Francis Bacon, "The Maxims of the Law," in *The Works of Francis Bacon, Baron of Verulam, Viscount St. Alban, and Lord High Chancellor of England*, vol. 2 (D. Midwinter, W. Innys, D. Browne, C. Davis, J. and R. Tonson, A. Millar and J. Ward, 1753), 12.

³⁰² John Doddridge, "The Lawyers Light" 1629, 86.

Indictments and Judgments.”³⁰³ But much was at stake in the method through which the reason behind the judgments, and in that the generality of the law, was discovered. Coke would no doubt have agreed with Doddridge that “wholly to respect particular cases, without any observation of the general Rules and Reasons, and to charge the memory with infinite singularities” would be “a labour of unspeakable toil” and a threat to the certainty of law.³⁰⁴ However, the assertion that from the “abundance of Rules and Propositions one Case contains” one can ascend “until we find out the very primary ground of natural Reason, from whence all the others are derived” may have belied too much the abstract, systematic logic of civilians to fully capture Coke’s almost spiritual view of the common law and its history as interwoven with that of the English people. Similarly, Coke would have no gripe with Bacon that “from the harmony of laws and decided cases” can be found “the general dictates of reason, which run through the different matters of law, and act as its ballast.”³⁰⁵ However, in elaborating upon his inductive method, Bacon’s assertion that it be “a matter undue and preposterous to prove rules and maxims” with cases, and that he preferred to “weigh down the authorities by evidence of reason, and therein rather to correct the law, than either to soothe a received error, or by unprofitable subtlety” would, in the mind of Coke, subject the common law too much to the universal pretensions of the philosopher’s reason.³⁰⁶ Bacon’s claims elsewhere that the rules he hoped to discover were “inherent in the very form of justice” and especially that “for the most part nearly the same rules are found in the civil laws of different states” would upset the national particularism of Coke’s thought.³⁰⁷

Sources of uncertainty

³⁰³ Sir Edward Coke, *The Reports of Sir Edward Coke*, ed. George Wilson, vol. 4 (Dublin: Printed for J. Moore, 1793), chap. Preface to the Eight Part of the Reports.

³⁰⁴ Doddridge, “The Lawyers Light,” 108.

³⁰⁵ Francis Bacon, *The Works of Francis Bacon*, ed. James Spedding, Robert Leslie Ellis, and Douglas Denon Heath (Cambridge: Cambridge University Press, 2011), 105–106.

³⁰⁶ Francis Bacon, *The Works of Francis Bacon*, ed. James Spedding, Robert Leslie Ellis, and Douglas Denon Heath, vol. 7 (Cambridge: Cambridge University Press, 2011), 322.

³⁰⁷ Bacon, *The Works of Francis Bacon*, 2011, 106.

Despite their belief in the overall coherence of the common law, its defenders were often confronted with accusations that some areas were uncertain or inconsistent, or at least may have appeared so to a layperson. Much energy was devoted to refuting such accusations, often locating the source of uncertainty in a contingent or rare aspect of the common law rather than locating it at the heart of the practice. For example, Coke tried to explain away anything that may have resembled confusion in the common law whilst maintaining its fundamental integrity, claiming that “the Law is not incertain *in Abstracto* but *in Concreto*”, blaming the latter on “preposterous reading” and “oversoon practice”.³⁰⁸ Davies similarly deflects questioning its deeper underlying coherence, arguing that from the highest courts in Westminster Hall down to the Assizes questions rarely arise upon law but upon fact, and that “if the truth of the Fact were known, the Law were clear and without question.”³⁰⁹ Even where writers did acknowledge the contested nature of law, it after all being a deliberative practice, it was the weakness of men’s reasoning in the face of the variety of circumstances to which it was applied, rather than the law’s reason itself, that was blamed. For Davies, given that human reason was “*Lesbia Regula*, pliable every way” and that knowledge of the law was accessible only through argument and discourse it “must needs be subject to uncertainty and to error.”³¹⁰ Doddridge similarly stated that knowledge of the common law by discourse and reasoning “through the weakness of Mans understanding, and difficulty of the matter, may fail and be oftentimes deceived in some Circumstances which may and daily occur through the variety of particular matter, which again (in Reason) may offer a Contrary resolution”³¹¹

The variety which confronted the common lawyers was often characterised in a manner that avoided seriously questioning its overall coherence and, if anything, made a virtue of the perceived pragmatic, problem-solving nature of its practice. For example, it was accepted that the common law, like any human institution, was incapable of providing for every possible mischief that may arise. For Bacon it was clear that the “narrow compass

³⁰⁸ Coke, *The Reports of Sir Edward Coke, Kt. [1572-1617]*, 1793, vol. 4, chap. Preface to the Ninth Part of the Reports.

³⁰⁹ John Davies, *Le Primer Report Des Cases et Matters En Ley Resolues et Adjudges En Les Courts Del Roy En Ireland* (London: Printed for the Company of Stationers, 1628), 136.

³¹⁰ *Ibid.*, 135.

³¹¹ Doddridge, “The Lawyers Light,” 57–58.

of human wisdom cannot take in all the cases which time may discover; when new and omitted cases often present themselves.”³¹² However, this source of uncertainty was often narrowed, presented as arising in the occasional case that presented a novel problem or extraordinary circumstances consequent of some emergency rather than as a systematic presence in its day-to-day governance. Davies, responding to those claiming “our later Judgments do many times cross and contradict the former directly” explained that “we should find them grounded upon mischiefs and inconveniences arising since the former Judgments”.³¹³ Hale, perhaps reflecting on the political struggles of the first half of the seventeenth century, observed how “new and unthought of emergencies often happen,”³¹⁴ and cited the requirement that a practitioner have “a very large prospect of all the most considerable emergencies that may happen not only in that which is intended to be remedied, but in those other accidental, Consequential or Collateral things that may Emerge upon the Remedy propounded.”³¹⁵ However, when the common law was confronted with novel circumstances or emergencies of this nature, rather than its coherence being questioned, its pragmatic, adaptable problem-solving nature was extolled. Hale commented that meeting such emergencies “requires much time and much experience, as well as much wisdom and prudence successfully to discover defects and inconveniences, and to apply apt supplements and remedies for them”, all of which were to be found in the common law.³¹⁶

Common lawyers sometimes envisioned this diversity in stronger terms, demonstrating a more complex and difficult understanding of the social environment within which the common law operated. Davies suggested that regardless of law’s scope or volume it would “carry no proportion with the infinite diversity of men’s Actions, and of other accidents...”, it being the inescapable challenge of legal judgement to apply a fixed and certain law to a social environment which was “in perpetual motion and mutation.”³¹⁷

³¹² Bacon, *The Works of Francis Bacon*, 2011, 314.

³¹³ Davies, *Le Primer Report Des Cases et Matters En Ley Resolues et Adiudges En Les Courts Del Roy En Ireland*.

³¹⁴ Matthew Hale, “Preface to Rolle’s Abridgment” n.d., 267.

³¹⁵ Frederick Pollock, “Sir Matthew Hale on Hobbes: An Unpublished Ms.,” *Law Quarterly Review* 37 (1921): 290.

³¹⁶ Hale, “Preface to Rolle’s Abridgment,” 267.

³¹⁷ Davies, *Le Primer Report Des Cases et Matters En Ley Resolues et Adiudges En Les Courts Del Roy En Ireland*.

Echoing these sentiments Doddridge cited the material cause of law's contested nature not only in the limitations of man's faculties but in "the infinite variety of circumstances that in all humane actions do happen."³¹⁸ He traced divine intention behind this infinite diversity, stating that "God in his most excellent work...hath furnished the world with unspeakable variety, thereby making manifest unto all humane creatures, to their great astonishment, his incomprehensible wisdom, his omnipotent power, & his unsearchable providence".³¹⁹ Rebutting Hobbes' attack on Coke's belief in the artificial reason of the common law accessible only by those with expertise and experience in its practice, Hale emphasised the inability of an undisciplined natural reason to comprehend and order human activity. Law exceeded the deductive reasoning that governed the relation between general principles and particular applications in the abstract, speculative disciplines of logic and mathematics. It was "the nature of moral actions" that they "most commonly are strangely diversified by infinite circumstances," meaning although men may agree at an abstract level on a notion of justice, dispute may still arise as to its application in the particular "even although interest and partiality of mind (which are very incident to mankind) do not interpose."³²⁰

The emphasis on the 'infinite particulars' of the social body drew out an important tension in the conception of common law as reason. Where the main challenge to the coherence of the common law was conceived as the negligent practice of its practitioners, the limitations of individual reason, or an extraordinary set of facts thrown up by the occasional emergency, common lawyers could argue that by drawing upon the experience and wisdom of its own tradition it could repair itself. But the image of diversity as infinite, incomprehensible and unceasing spoke to deeper, more pervasive feature of the environment in which the common law operated, and potentially more threatening to its claim to coherence. In one sense talk of how the social body's complexity was incomprehensible to undisciplined reason may have strengthened the authoritative appeal of common law as nothing but artificial, perfected reason. Coke often drew upon an image of the common law as always transcending the sum of its parts, as in his famous phrase

³¹⁸ Doddridge, "The Lawyers Light," 85.

³¹⁹ Ibid., 85–86.

³²⁰ Hale, "Preface to Rolle's Abridgment," 274.

encapsulating artificial reason that “no man out of his own private reason ought to be wiser than the law, which is the perfection of reason.”³²¹ The court being where “Almighty God openeth and enlargeth the understanding of the desirous of Justice and Right”.³²² Coke saw this transcendence the common law was capable of as having an almost divine source. The artificial reason of the common law thus promised order informed by wisdom and experience that transcended the teeming complexity of social life.

On the other hand the common law was perceived to live through its concrete practice. The engagement with the particularities of cases through argument and deliberation in the court reinforced belief in the strength of its pragmatic, problem-solving capacities. The veneration of its actual practice was captured by Davies:

The Law of itself is dumb, & speaks not but by the tongue of the learned & eloquent Lawyer: she is deaf, and heareth no complaints but by the ear of a grave and patient Judge: she is blind, and sees no enormities but by the eye of a watchful and diligent Officer. Again, the Law is nothing but a Rule which is made to measure the actions of men. But a Rule is dead, and measures nothing, unless the hand of the Architect do apply it.”³²³

Between the stable and coherent order promised by the common law and the incomprehensible complexity of English society stood the architect-practitioner, applying the general principles of a law that transcends individual reason to the particularities of human behaviour that exceeded full comprehension. The complexity of human actions militated against the belief that the method of reasoning in the common law could be reduced to mere rational deduction from general and abstract principles to particular cases, which was the theme of Hale’s response to Hobbes’ criticisms of artificial reason. On the other hand, an awareness of the immense complexity of human actions increased focus on how, when they were represented and deliberated upon in the court room and determined

³²¹ Sir Edward Coke, *The First Part of the Institutes of the Laws of England; Or, a Commentary upon Littleton*, ed. Francis Hargrave, 13th ed. (London: Printed by T. Wright, 1788), sec. 377.

³²² Sir Edward Coke, *The Reports of Sir Edward Coke*, ed. George Wilson, vol. 5 (Dublin: Printed for J. Moore, 1793), chap. Preface to the Ninth Part of the Reports.

³²³ Davies, *Le Primer Report Des Cases et Matters En Ley Resolues et Adiudges En Les Courts Del Roy En Ireland*.

in judgment, the overarching coherence and certainty of the common law was maintained. Whereas recognition of immense complexity and diversity in human society may have strengthened the authoritative appeal of general principles, it increased scrutiny of the method by which these principles were realised in particular applications.

Social order and legal order

This tension between law's generality and the complexity of society highlighted to a greater extent than previously that the common law not only applies judgment but is also a method or technique of representing human activity. The importance of this dimension of the common law had, to some extent, always been acknowledged by the perception that the common law was not merely an applied 'law of reason', but that the relation between general and particular in it was an art or method not reducible to natural reason. This of course was captured in Coke's notion of 'artificial reason', and earlier in the sixteenth century by St German's *Doctor and Student* in the notion of the 'law of reason secondary' interposing between the law's general postulates (either in custom or the law of reason) and their particular consequence which "therein dependeth much the manner and form of arguments in the laws of England."³²⁴ Hedley in a speech to Parliament almost a century later similarly affirmed its primary role in the common law, stating that the common law "hath not custom for his next or immediate cause, but many other secondary reasons which be necessary consequence upon other rules and cases in law".³²⁵ Such discussion of secondary reason interposed between the general and particular indicates the importance its defenders invested in not necessarily the sources or the general principles of the common law but its method.

³²⁴ Christopher Saint German, *Doctor and Student: Or, Dialogues Between a Doctor of Divinity, and a Student in the Laws of England: Containing the Grounds of Those Laws, Together with Questions and Cases Concerning the Equity Thereof*, ed. Andrew Muchall (Dublin: James Moore, 1792), 16.

³²⁵ Elisabeth R Foster, ed., *Proceedings in Parliament 1610*, vol. 2 (New Haven, Conn.: Yale University Press, 1966), 175–176.

However, it is in Sir John Doddridge's detailed exploration of 'contingent propositions or grounds' in his manual for students *The Lawyer's Light* that the significance of this focus in the context of the growing perception of the complexity of human society can be seen. It has already been noted how Doddridge considered that God had "furnished the world with unspeakable variety" as an expression of his "incomprehensible wisdom, his omnipotent power, & his unsearchable providence".³²⁶ However, he immediately followed that "being the God of order, not of confusion, [he] hath admitted no infiniteness in nature (howsoever otherwise it seem to our weak capacities) but hath continued the innumerable variety of particular things under certain specials; and those specials under generals; and those generals again under causes more general, linking and conjoining one thing to another, as by a chain, even until we ascend unto himself, the first chief and principal cause of all good things."³²⁷ This passage appears to introduce a tension into the question of order, making God at once responsible on the one hand for the problem of 'unspeakable variety' and on the other hand the 'generals' they necessitate and through which they are ordered. The notion of order naturally inhering in things themselves is weakened, with the image of order as a purposive construction to mitigate confusion for the immanent benefit of man in its place. Although originating in God's will or providence, order takes on a more artificial quality, immanent to the needs of human society as opposed to transcending it as universally inhering in nature.

This disconnect between natural and legal order is evident in Doddridge's discussion of secondary rules, in particular those grounded upon what he calls 'common presumption and entendment'. Doddridge's description of how this body of rules operates highlights a distinction between the law's representation of human activity and any external standard of 'truth'. When applied the identity of these rule's representation of human activity with 'nature' is "but probable, and import no certain truth, and therefore may notwithstanding be sometimes untrue",³²⁸ similarly stating in relation to rules grounded in 'presumption of

³²⁶ Doddridge, "The Lawyers Light," 85–86.

³²⁷ Ibid.

³²⁸ Ibid., 47.

natural affection' that they are not "foundeth always true".³²⁹ Moreover, the validity of these presumptions in law was to be firmly protected, allowing "no allegation to impugn them, or any speech or averment to impeach their credit," even if "there be never so pregnant proof to encounter the same."³³⁰ Doddridge clearly sensed that the manner in which human activity was represented by these rules was to some extent artificial, and embodied within an order for which the truth of a proposition being applied to a particular set of facts was distinct from the true propositions of any natural or transcending order. Nor did the disconnect between the rule's representation of human behaviour and its truth necessarily mitigate its authority, it being possible to "show how every man should be affected [according to the law], notwithstanding it is no proof that all men are so affected."³³¹

Doddridge envisioned that these artificial techniques of representing human activity were governed by purposes inherent to the legal order and dictated by human society, rather than a transcendent divine or natural source. These representations could abandon their connection to truth as they were "the better to frame a conformity" throughout the system.³³² The connection between the representation offered by the general rule and its truth was grounded in the preferences of the "Ordainers and Interpreters of Law" who "respect rather those things which may often happen; and not every particular circumstance".³³³ Doddridge also justifies the use of abstract propositions to represent human activity more generally, drawing upon the instrumental value to human society of envisioning order in such a way rather than claiming it to have a connection to an order inhering in things. He speaks of how "things proposed in the generality are best known and most familiar to our concept, since they be the proper object of our understanding..." and that they "better adhere and stick in memory, since Intellective memory is (as the understanding is) employed about universal and general things."³³⁴ The artificiality of the law's ordering of things is emphasised further as Doddridge compares different techniques

³²⁹ Ibid., 48.

³³⁰ Ibid., 47–48.

³³¹ Ibid., 48.

³³² Ibid.

³³³ Ibid., 60.

³³⁴ Ibid., 89.

of ordering and weighs up their value, stating that “general Propositions are the speedy instruments of knowledge” whereas “experience, which wholly is gotten by the observation of particular things (being deprived of speculation) is slow, blind, doubtful and deceivable, and truly called the mistress of fools.”³³⁵ The location of Doddridge’s manual in the transition between a natural and transcendent understanding of the order of reason and the acknowledgement of its artificial and instrumental foundation is subtly captured by his description of “universal Propositions” as both “perpetual and eternal”.³³⁶ The former suggests that propositions, despite being subject to time, maintain their universality, speaking to a more immanent and artificial notion of order as constructed in and through human reasoning. The latter on the other hand suggests its universality is not subject to time, but rather transcends it, speaking to the notion of order as inhering in the nature of things. The fact that Doddridge felt these two descriptions were equivalent may speak to the particular way in which the authority of the common law was believed to lie in its historicism, discussed in the next section.

Underlying Doddridge’s perception of legal ordering and its contingent relation to other forms of ‘truth’ such as those found in nature is an understanding of legal reasoning and judgement distinct from the deductive method associated with natural or civil law. This is expressed primarily where Doddridge explains the method by which a ‘true’ legal proposition is established. When discussing general ‘contingent propositions or grounds’ he states they are “not universally true, but subject to many and manifold Exceptions” yet are “nevertheless true in all such cases as are not comprehended under those Restraints or Exceptions.”³³⁷ Here the truth of any legal proposition is linked to contemplation of its exceptions, of the particular factual scenarios that represent the limit or boundary of the rule. This image is reinforced elsewhere when he states that “almost every disposition in the Laws...resteth between the Rule and the exception”.³³⁸ This image of the law presented by Doddridge suggests a more nuanced relationship between general propositions and their particular consequences than mere deduction of the latter from the former. Indeed, for

³³⁵ Ibid.

³³⁶ Ibid.

³³⁷ Ibid., 58.

³³⁸ Ibid., 79–80.

Doddridge the court's judgment does not merely declare that particular facts in human society fall under a principle, rule or maxim. It also determines that those facts do not exceed the boundaries of the rule and fall within any of its exceptions - hence it is 'resting' between the rule and the exception. In stating that propositions of law inescapably contain considerations of the rule's limits, the representative dimension of law in relation to human actions is emphasised. General propositions do not exist in the abstract, containing within themselves the consequences they have for human actions when applied, as if there were an inherent order in human actions which is either presumed to be uniform with the order of the law or onto which the law attaches. Rather, Doddridge's notion of the proposition resting between the rule and the exception suggests that these general propositions exist through an inescapable interpretive engagement with concrete and particular facts, a determination of the limits of the general proposition in its actual realisation, however those limits are governed. Rather than presuming the order of human actions as being represented by the law, in Doddridge's understanding such representation becomes a central task of the law, the product of an always-active engagement at the interface between the law and human actions.

The perception of law, reasoning and judgment presented by Doddridge seemingly conflicts with the distinction we saw Coke draw between law *in abstracto* and *in concreto* in order to defend it from accusations of uncertainty. On the contrary, Doddridge's discussion of secondary reason emphasises their necessary connection. The concept of law underlying Doddridge's analysis makes its representation of human activity central to its operation, where general propositions of law do not exist merely *in abstracto* but through a constant engagement with the limits of their application *in concreto*. This shift in emphasis towards representation of human activity can be traced back to the perception of society's increasing complexity, and the accompanying loss of a sense that a natural order discoverable to natural reason inhered in it. These factors highlighted the artificiality of the legal order, its concepts and its purposes as distinct from other natural, transcendent sources of order. The increased focus on law's work of representation and the loss of timelessness in its ultimate sources framed the major themes in debates surrounding the sources and authority of both the common law and English law in general throughout the

seventeenth century. The solution to Coke's problem of certainty and continuity in the common law needed to be found where the universal and timeless qualities of reason and order were in doubt. As will be seen in the next section, two key components of this solution were to be found in the character of common law as custom and reasonableness.

4. Law, Society and Custom: St German

In this section St German's early attempt to rethink the sources of English law is outlined, highlighting the prominence that he gave to custom. It is argued that the impetus behind this move to custom was an acknowledgement of law's immanence to society as a fundamental problem of legal order. Moreover, it is argued that there were tensions in St German's account of this move to custom concerning its sources and content. These are outlined and presented as originating in the problem of incorporating court practices surrounding law's representative function within a coherent account of the sources and authority of the law.

Custom as a source of English law

Published in the sixteenth century, St German's *Doctor and Student*, an account of a hypothetical conversation between a doctor of divinity and a student of the common law, represents an early example of the tensions introduced by attempts to reconcile law's representative function with an account of its authoritative sources. Two themes of *Doctor and Student* are noteworthy. First is the emphasis upon custom, rather than the law of reason, as the primary source of the common law. St German identifies the "divers general customs of old time used through all the realm" as a primary ground of English law, stating

that “these be the custom that properly be called the common law.”³³⁹ It is upon these general customs and maxims which “take effect by the old custom of the realm” that “dependeth most part of the law of this realm.”³⁴⁰

The shift in focus onto custom appears to be partly informed by an awareness that the role of secondary reason in legal method could not be reduced to the abstract universality of the law of reason. Although St German maintains that nothing against the law of reason can be law, he does not see it as a primary source of English law. In response to those that, in light of the prominence of secondary reason in English law “have affirmed that all the law of the realm is the law of reason” St German asserts that “that cannot be proved”.³⁴¹ The distinction between custom and reason is asserted elsewhere when St German states that customs “cannot be proved to have the strength of law only by reason.”³⁴² Similarly, those maxims that derive from custom “needeth not to assign any reason why they were first received for maxims, for it sufficeth that they be not against the law of reason, nor the law of God, and that they have always been taken for a law.”³⁴³

Where English law could clearly not be deduced from the law of reason alone, custom became an important, if not the primary source, of its certainty and authority. When the doctor of divinity suggests that because the laws “cannot be proved by reason...they may as lightly be denied as affirmed” the student of the common law responds that “[m]any of the customs and maxims be known by the use and the custom of the realm”, seemingly envisioning that custom and use give not only certainty to the law but also that they carry an authority equivalent to the law of reason.³⁴⁴

³³⁹ Saint German, *Doctor and Student*, 18.

³⁴⁰ *Ibid.*, 19.

³⁴¹ *Ibid.*, 14.

³⁴² *Ibid.*, 25.

³⁴³ *Ibid.*, 26.

³⁴⁴ *Ibid.*, 33–34.

Custom: continuity and reasonableness

The second theme focuses more directly on St German's understanding of 'custom'. Although the increased emphasis upon custom as an important source of law may have been informed by the inability to reduce the secondary reason involved in the practice of law to the abstract universality of the law of reason, it simultaneously highlighted an apparent tension in the concept of custom. This tension is evident in *Doctor and Student* in two different ways. The first concerns St German's understanding of the source of customs, whether they be located in 'popular' knowledge and usage or in the practice of the courts. *Doctor and Student* provides evidence that St German entertained both understandings. On the one hand he emphasises the fact that these customs are "used through all the realm" and that they have not only been accepted by the king and his descendants, but significantly by "all his subjects."³⁴⁵ The popular nature of such custom is emphasised elsewhere where he states that they "be in a manner known through the realm, as well to them that be unlearned as learned, and may lightly be had and known, and that with little study".³⁴⁶

However, elsewhere he seems to portray a different understanding of custom as associated more specifically with the practice of the courts. Maxims, despite their ultimate source in the general customs of the realm, "be only known in the king's courts, or among them that take great study in the law of the realm, and among few other persons", and as such the existence of maxims "shall alway be determined by the judges, and not by twelve men."³⁴⁷ More significant are his comments undermining the link he makes elsewhere between the existence of a custom and it being known and accepted throughout the realm. For example, the popular quality of custom is undermined where St German acknowledges the existence of customs with legal force which "be not so openly known among the people".³⁴⁸ The impression is firmly given that the custom concerned is that of the court where he explicitly locates the authority to determine the existence of a custom with the

³⁴⁵ Ibid., 16.

³⁴⁶ Ibid., 26.

³⁴⁷ Ibid.

³⁴⁸ Ibid., 34.

judges rather than the jury as the representative of ‘popular justice’ in the court, stating “it shall alway be determined by the justices whether there be any such general custom or not, and not by twelve men.”³⁴⁹ This is more noteworthy in light of the contrast with St German’s perspective on local custom, the existence of which is to be determined by “twelve men, and not by the judges”.³⁵⁰

The second uncertainty in St German’s understanding of custom concerns what gives them their binding quality. On the one hand the authority of customs seems to derive from their positive recognition and acceptance; that they have been ‘accepted’, ‘approved’, or are ‘known’, even if the identity of those whose acceptance, approval or knowledge is relevant changes. Maxims in particular appear to be given a strong basis in the precedent or tradition evident in the courts’ practice, there being no need “to assign any reason why they were first received for maxims” it being sufficient that “they have always been taken for a law.”³⁵¹ However, St German clearly perceives a limit in locating the authority of custom purely in positive recognition and acceptance, emphasising also their ‘reasonable’ quality, albeit in a manner that does not make it entirely clear whether all customs are by necessity reasonable, or whether it is just those that are a part of English law which are. Of particular interest is that he seems to perceive an association between the law of reason and ‘reasonableness’, albeit operating in different ways. The connection is apparent where he states that although customs “cannot be proved only by reason, that is should be so, and no otherwise, although they be reasonable”.³⁵² Whereas the law of reason plays only a minimal and abstract role, mostly intervening to negate the authority of a custom that contravenes it, its reasonableness is a positive quality always present in the custom.

The importance of reasonableness becomes clearer in his discussion of maxims. Whilst citing that no reason need be assigned why they were first received for maxims, and the familiar qualification that they must not be against the law of reason, he seemingly

³⁴⁹ Ibid., 16.

³⁵⁰ Ibid., 35.

³⁵¹ Ibid., 26.

³⁵² Ibid., 25.

contradicts this positive view of maxims by stating that because “cases like unto them, and all things that necessarily follow upon the same are to be reduced to the like law” that “most commonly there be assigned some reasons or considerations why such maxims be reasonable, to the intent that other cases like may the more conveniently be applied to them.”³⁵³ The ‘reasonableness’ of the custom or maxim is thus intrinsic to the functioning of the legal order in general, enabling the drawing of similarities and distinctions between different sets of facts so as to allow the application of the maxim to different particular cases. The specifically legal quality of a custom or maxim, its place within a system of law, thus has a clear association with this reasonableness.

Custom, law and society

The tensions in St German’s use of custom as a source of law contain important themes for thinking about broader developments, indicating the difficulties in conceptualising the sources of English law where the ordering dynamic of law is emphasised. In this context the move to custom can be seen as an attempt to articulate the interaction between legal order and society that the timeless universalism of the law of reason was perceived to lack. The popular conception of custom expressed this immanence through the image of the origin of customs in the use and practice of the people. Law was anchored in society by an organic identity between the two, which the courts recognise and give effect too. The conception of custom as restricted to the king’s courts however gives expression to a different understanding of the relationship between legal order and society, where it loses its organic quality and instead is recognised as a ‘problem’ by the court to be confronted and resolved by application of the courts’ specialised reasoning practices.

The tension between the positivity of custom on the one hand and its reasonableness on the other similarly indicates contrasting ways of imagining the

³⁵³ Ibid., 26.

relationship between legal order and society, each speaking to the problem of understanding the authority of law where assumptions concerning its nature were being undermined by the increasing complexity of its environment. The positive conception of custom spoke to a sense of law whereby the relationship between legal order and society was confronted by anchoring law in a pre-existing fact of approval or acceptance. Custom as reasonableness however spoke to a different notion of law more receptive to development and adaptation, underpinned by a more complicated image of law's relation to society. As with the association of custom with the king's courts, reasonableness appears to make legal order's relationship to society the subject not of an organic, pre-existing identity, but rather shaped by the court's acknowledgement of society itself as a problem and the directing of practices towards it. More than the positive concept of custom, it emphasises the work of law in representing and ordering its social environment, extending or restricting principles by differentiating and grouping together different facts through case decisions. As will be seen in the following section, the problem of legal order's general coherence was fundamental to rethinking the sources legal authority during this period.

This section has outlined how St German's emphasis on custom as a source of English law was driven by the need to rethink law's relationship to society where the abstract and timeless universals of the law of reason, or other sources such as God or Nature, could not account for legal practices surrounding the application of law in an increasingly complex social environment. However, as we have seen, this immanence between law and society was expressed in contrasting and contradictory ways. As long as St German's concerns were restricted to certainty in English law, this tension could be contained, if not resolved. However, the political and constitutional struggles between courts, king and parliament that marked the move into the seventeenth century made the basis of the common law's authority in its customary sources the subject of increased scrutiny, forcing the tension identified here into the open and rendering it more difficult to contain.

5. Legal Authority and Continuity: Coke, Davies and Hedley

St German's move to custom as an important source of English law highlighted the increasing prominence of the relationship between legal order and society in its practice, as well as introducing new tensions in how that practice was envisioned. In this section it will be seen how this move to custom was incorporated into an understanding of legal authority, in particular that of the common law - a question forced by the political conflicts of seventeenth century England. It will be seen how the authors covered in this section acknowledge the common law's connection to the nation as the basis for its claim to authority. However, it will also be seen that, although these authors acknowledged the relationship between law and society as the fundamental problem of legal order and the basis for its authority, they failed to articulate an understanding of law that accounted for how and why society became its primary problem. By imagining the authority of the common law as grounded in a timeless tradition, they failed to capture the interaction between legal order and society which was coming to structure and inform many of its actual practices.

The common law, nation and history

The authority of the common law was the subject of intense partisan debate as the constitutional relationship between the common law courts, the crown and Parliament was thrown into focus by the political conflicts of the seventeenth century. In an effort to secure its jurisdiction against expansive interpretations of the Crown prerogative on the one hand and the hold of the doctrine of Parliamentary sovereignty on the other, those seeking to defend the authority of the common law in the English constitution often stressed a deep-seated identity between the common law and the nation that they claimed these other political institutions could not match. Davies is typical in his attitude when he wrote that the common law was "so framed and fitted to the nature and disposition of this people, as

we may properly say it is connatural to the Nation, so as it cannot possibly be ruled by any other law”, the nation being bound to the common law “like a silk-worm that formeth all her web out of her self only”.³⁵⁴ Hedley’s rhetoric similarly emphasised such an identity, stating that the customary origins of the common law meant it “hath so adopted and accommodated this law to this kingdom as a garment fitted to the body or a glove to the hand or rather as the skin to the hand, which groweth with it, for *consuetude est altera natura*”.³⁵⁵

Corresponding to this strong identity between the common law and the nation was a concerted effort to guard against attempts to reduce the origins of the common law to positive, historical events.³⁵⁶ Coke, rejecting that the Norman Conquest had introduced any significant changes to the common law, stated that “[t]he grounds of our common laws at this day are beyond the memory or register of any beginning”.³⁵⁷ Davies argued that just as the law of nature that was “written only in the heart of man” the common law was “written only in the memory of man”,³⁵⁸ whereas Hedley argued that the origins of the common law existed in “time whereof the memory of man is not to the contrary, time out of mind, such time as will beget a custom.”³⁵⁹ As the common law existed beyond memory, it could not be said to have been willed or enacted by anyone, for “neither did the King make his own Prerogative, nor the Judges make the Rules or Maximes of the Law, nor the common subject prescribe and limit the Liberties which he enjoyeth by the Law.”³⁶⁰ If the common law could be proven to have existed without origin or beyond any memory of it, or if at least enough people could be convinced that it was so proven, the difficult question of from where the

³⁵⁴ Davies, *Le Primer Report Des Cases et Matters En Ley Resolues et Adiudges En Les Courts Del Roy En Ireland*, chap. Preface.

³⁵⁵ Foster, *Proceedings in Parliament, 1610*, 2:180.

³⁵⁶ The standard text on the idea of the common law as part of the ‘ancient constitutions’ is J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century*, 2 edition (Cambridge Cambridgeshire ; New York: Cambridge University Press, 1987).

³⁵⁷ Coke, *The Reports of Sir Edward Coke, Kt. [1572-1617]*, 1793, 4: The Eighth Part of the Reports, iv.

³⁵⁸ Davies, *Le Primer Report Des Cases et Matters En Ley Resolues et Adiudges En Les Courts Del Roy En Ireland*, chap. Preface.

³⁵⁹ Foster, *Proceedings in Parliament, 1610*, 2:175.

³⁶⁰ Davies, *Le Primer Report Des Cases et Matters En Ley Resolues et Adiudges En Les Courts Del Roy En Ireland*, chap. Preface.

authority of the initial declaration derived could be avoided, and the identity of the common law with the nation as somehow transcending history affirmed.

However, this perception of the common law was subject to challenge, first by Sir John Selden and then later in the century by Sir Matthew Hale, who strongly rebuked the Cokean view of the history of the common law perpetuated by those seeking to emphasise its essential continuity. Commenting on the sources relied upon by those who sought to trace the continuity of the common law back to the Roman era, the historian Selden stated he could “see not why any, but one that is too prodigal of his faith, should believe it more than Poetical story, which is all one (for the most part) with a fiction.”³⁶¹ Whereas the Cokean perspective identified in the common law an almost eternal continuity, for Selden and Hale the history of English law was marked more directly by its diversity of influences. Selden, commenting on the influence upon English law of the various nations that had, by conquest or otherwise, settled in England, stated that “[a]s succeeding ages, so new nations...bring always some alteration, by this wel considered, that the laws of this realm being never changed will be better understood.”³⁶² Hale similarly demonstrated a more cosmopolitan attitude to the development of English law, abandoning the narrow, nationalist tone of the Cokean perspective for one more open to the diversity of its sources, rejecting the view that the authority of English law derived from the purity of its sources, but sought to understand its authority regardless of “from when or whomsoever [laws] derive; or what laws of other countries contributed to the matter of our laws”.³⁶³

Moreover, Selden and Hale did not follow the Cokean perspective in avoiding reducing the common law to institution, but instead embraced the possibility of its positive enactment. Selden quite pointedly stated that “Laws are not without their Makers and their Guardians”, arguing that law could be “made either by Use or Custom (for things that are approved by long Use, do obtain the force of Law) or by the Sanction and Authority of Law-

³⁶¹ Sir John Fortesque, *De Laudibus Legum Angliae*, ed. John Selden (London: Printed for T. Evans, 1775), 50.

³⁶² *Ibid.*, 47.

³⁶³ Sir Matthew Hale, *The History of the Common Law of England*, 3rd ed. (London: E. and R. Nutt and R. Gosling, 1739), 64.

givers.”³⁶⁴ Hale similarly emphasised the positive creation of law, arguing that English laws “are Institutions introduced by the will and Consent of others implicitly by Custom and usage, or Explicitly by written Law or Acts of Parliament.”³⁶⁵

At stake between these competing visions of the origins and development of English law is the relation between legal order and society. Whereas St German’s move to custom was informed by the inadequacy of other sources to account for certain aspects of law’s practice, in particular the role of secondary reason, Coke incorporated it more explicitly into an account of the authority of the common law. By locating the authority of the common law in its customary foundations, an identity was established between its vision of legal order and society which could not be matched by either King or Parliament, a bond which could be traced not so much through history but beyond it. Selden and Hale’s challenge was to question this way of envisioning the authority of the common law by questioning the way it envisioned the historicism of law. Whereas Coke envisioned the authority of the common law as laying in a history fundamentally unchanged by events, for Selden and Hale the history of the common law (and law in general) cannot be found in anything other than its being shaped by events. As will be seen below, in attempting to secure the authority of the common law, Coke drew upon an understanding of custom which failed to capture the interaction between legal order and society present in its actual practice, and which generated the initial shift towards the focus on custom as an important, if not primary, source of law.

‘Tried reason’ – continuity and adaptability

That the authority of the common law rested upon continuity through time was explicitly argued by Hedley in his speech to Parliament in 1610. Following the Cokean

³⁶⁴ John Selden, “Jani Anglorum Facies Altera,” in *Tracts Written by John Selden*, trans. Redman Westcott (London: Printed for Thomas Basset and Richard Chiswell, 1683), 93.

³⁶⁵ Pollock, “Sir Matthew Hale on Hobbes,” 292.

concept of common law as reason, Hedley proposed the fundamental problem of legal authority as “though it be true that all law is reason, yet that is no convertible proposition, for everyone knows that all reason it not law”.³⁶⁶ In seeking to find what made reason into law, Hedley employed the familiar tactic of avoiding reducing it to the authoritative and positive declaration of any one particular institution - not Parliament, the King nor even the judges themselves. Hedley’s solution was to argue that time was the ultimate trier of reason, and was that which gave reason its binding legal quality, for time was “trier of truth, author of all human wisdom, learning and knowledge, and from which all human laws received their chiefest strength, honour and estimation.”³⁶⁷ Time had the advantage of not being reducible to positive institutions and their particular political ambitions or individual men and their private interests, but was “wiser than the judges, wiser than the parliament, nay wiser than the wit of man.”³⁶⁸ Law therefore essentially took the form of “tried reason, that is, the best reason or the quintessence of reason, reason tried and allowed by the wisdom of time for many ages together to be good and profitable for the commonwealth.”³⁶⁹

Having made time the trier of reason, and tried reason the essence of law, he closed the circle by making time “the essential form of the common law”.³⁷⁰ Under Hedley’s characterisation of law the common law’s claim to be the superior jurisdiction of the land was strengthened by drawing upon its supposed customary foundations and the association between custom and continuity. Where the authority of the law derived from “continuance but for some certain time, hereby to see and try by the wisdom of time and experience whether it be good and profitable for the common wealth or no”, superiority of the common law over parliament was that, whereas statute was tried “for 7 years or till the next Parliament” the common law was tried “time out of mind”.³⁷¹ Consequently the common law represented a perfected combination of time and reason, it being “a reasonable usage, throughout the whole realm, approved time out of mind in the king’s

³⁶⁶ Foster, *Proceedings in Parliament, 1610*, 2:172.

³⁶⁷ *Ibid.*, 2:175.

³⁶⁸ *Ibid.*

³⁶⁹ *Ibid.*, 2:178.

³⁷⁰ *Ibid.*, 2:175.

³⁷¹ *Ibid.*

courts of record which have jurisdiction over the whole kingdom, to be good and profitable for the commonwealth.”³⁷²

Davies similarly found the supposed continuity of the common law as evidence of its good reason. After having defined the common law as “nothing else but the Common Custome of the Realm” he went on to describe the continuity of custom as firm evidence of its reason, for a custom “doth never become a Law to bind the people, until it hath been tried and approved time out of mind, during all which time there did thereby arise no inconvenience: for if it had been found inconvenient at any time, it had been used no longer, but had been interrupted, and consequently it has lost the virtue and force of a Law.”³⁷³ As England had had a “good and happy Genius from the beginning” and had been “inhabited always with a virtuous and wise people”, authority was naturally bound with continuity, those people having “embraced honest and good Customs, full of reason and convenience, which being confirmed by common use and practice, and continued time out of mind, became the Common Law of the Land.”³⁷⁴

Coke attempted to read this association between time and reason into a history of the common law that emphasised its essential continuity. In particular he stressed how the common law had remained unchanged despite the Norman Conquest of 1066 and subsequent changes in English political governance, insisting that despite the upheavals England may have suffered in its history, the customary laws of the common law continued to be “of greatest antiquitie”.³⁷⁵ Moreover, their antiquity was evidence of their reason for “[i]f the ancient Lawes of this noble Island had not excelled all others, it could not be but some of the severall Conquerors, and Governors thereof...would (as every of them might) have altered or changed the same.”³⁷⁶ English history may have been marked by the influx

³⁷² Ibid.

³⁷³ Davies, *Le Primer Report Des Cases et Matters En Ley Resolues et Adiudges En Les Courts Del Roy En Ireland*, chap. Preface.

³⁷⁴ Ibid.

³⁷⁵ Sir Edward Coke, *The Reports of Sir Edward Coke*, ed. George Wilson, vol. 1 (Dublin: Printed for J. Moore, 1793), Preface to the Second Part of the Reports.

³⁷⁶ Ibid.

of different peoples from beyond the British Isles, including conquerors. But, in Coke's version of history at least, each found in England already a body of customary law which, given its superior reason, they decided to submit to or swore to observe, with the result that that common law survived up until the present day unaltered, or at least in its fundamental tenets.

Despite the strong identity between continuity of custom and 'tried reason' outlined in the preceding paragraphs, these same authors often indicated a quite different understanding, suggesting a tension in how they located the authority of the common law in its continuity through time. Hedley, arguing that "no unreasonable usage (prejudicial to the commonwealth) will ever make a law to bind the whole kingdom" went on to state that "whatsoever pretended rule or maxim of law, though it be coloured or gilt over with precedents and judgments, yet if it will not abide the touchstone of reason and trial of time, it is but counterfeit stuff, and no part of the common law."³⁷⁷ This passage suggests a different understanding of the 'trial of time' to that indicated above. Whereas above continuity in the form of being "approved time out of mind in the king's courts of record" was considered evidence of a custom's reason, the present passage suggests that "precedents and judgments" have no necessary connection to the 'trial of time', throwing up uncertainty as to what it may actually consist of.

The trial of time is elsewhere complicated by the suggestion that it implies a process of adaptation rather than continuity. To recall Hedley's metaphor, it was "the work of time, which hath so adopted and accommodated this law to this kingdom as a garment fitted to the body or a glove to the hand or rather as the skin to the hand, which groweth with it".³⁷⁸ The image indicates that the authority of law is framed by time not by remaining constant and unchanged through it, but by a process of adaptation within it, albeit in a manner that is inextricably bound to 'the kingdom'. This process of adaption was central also to Coke's concept of artificial reason. Coke drew upon an image of the common law's adaption

³⁷⁷ Foster, *Proceedings in Parliament*, 1610, 2:178.

³⁷⁸ *Ibid.*, 2:180.

through time to justify his claim that it was the perfection of reason, arguing that “[b]y many successions of ages it hath been fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection”.³⁷⁹

Occasionally both senses of the trial of time would be drawn upon in the same passage in order to describe the nature and authority of the common law. Davies, in promising to elaborate on the process by which a custom adapts and “groweth to perfection” immediately follows with an explanation of the process by which a custom comes into being and subsequently becomes law that draws heavily instead upon the image continuity: “When a reasonable act once done is found to be good and beneficial to the people, and agreeable to their nature and disposition, then do they use it and practise it again and again, and so by often iteration and multiplication of the act it becometh a Custome; and being continued without interruption time out of mind, it obtaineth the force of a Law.”³⁸⁰ Davies is silent on how the aspects of continuity and adaptability in the process by which custom obtains legal force are reconciled.

Coke similarly drew upon a dualistic understanding of the common law’s relation to time in elaborating upon the ‘trial by experience’ upon which it staked its authority. Arguing that alteration of any of the common law and customs of the realm was “most dangerous” he followed that “that which hath been refined and perfected by all the wisest men in former successions of ages and proved and approved by continual experience to be good & profitable for the common wealth, cannot without great hazard and danger be altered or changed.”³⁸¹ Two aspects of this passage are noteworthy. First is the contradictory presentation of common law’s relationship to time as on the one hand being actively ‘refined and perfected’, implying a process of adaptation, whilst on the other hand being ‘proved and approved’, implying recognition of an already existing continuity. Second is the

³⁷⁹ Coke, *The First Part of the Institutes of the Laws of England; Or, a Commentary upon Littleton*, sec. 138.

³⁸⁰ Davies, *Le Primer Report Des Cases et Matters En Ley Resolues et Adiudges En Les Courts Del Roy En Ireland*, Preface.

³⁸¹ Coke, *The Reports of Sir Edward Coke, Kt. [1572-1617]*, 1793, 2:Preface to the Fourth Part of the Reports, v–vi.

contradictory status of the common law as a body of rules with authoritative command over us in the present. Whilst Coke clearly perceives the capacity for adaptation that the common law has demonstrated in its history as an important component of its authority in the present, this authority is then expressed as a command to preserve against ‘dangerous’ alteration, a tension which is never reconciled, if even acknowledged, by Coke.

Custom and the common law courts

The dualism underpinning the ‘trial of time’ as the basis of the common law’s authority was expressed in the contrasting perspectives on the identity of the common law with custom. We have already seen that Davies claimed the common law was “nothing else but the Common Custome of the Realm”.³⁸² Hedley on the other hand was more cautious in drawing such a close identity between the two, warning that “I would not be mistaken, as though I meant to confound the common law with custom”³⁸³ The cause of such caution was an awareness that the standard of ‘reasonableness’ perceived as necessary to law could not be reconciled with the continuity being implied by custom. Hedley appears to understand the existence of custom in strongly positivist terms, seeing them as “confined to certain and particular places, triable by the country...to be taken according to the letter and precedent, and therefore admits small discourse of art or wit”.³⁸⁴ After stating that the reasonableness of a custom, if not its existence, is to be determined only by judges he then distinguishes the common law from custom on the basis that the common law “is extended by equity, that whatsoever falleth under the same reason will be found the same law.”³⁸⁵

Clearly Hedley perceived that an important feature of law, one that spoke to law as evolving or extending through time, could not be captured by the static image of continuity

³⁸² Davies, *Le Primer Report Des Cases et Matters En Ley Resolues et Adiudges En Les Courts Del Roy En Ireland*, chap. Preface.

³⁸³ Foster, *Proceedings in Parliament, 1610*, 2:175.

³⁸⁴ Ibid.

³⁸⁵ Ibid.

imposed by contemporary understandings of custom. Hedley, however, was caught in the trap of the Cokean perspective in seeking to defend the authority of the common law. On the one hand to reduce the common law to custom was to overlook enough of the reasoning practices of the court which could not be reduced to mere continuity that it would risk portraying an unrepresentative and unrealistic impression of the practice. Relying too much on custom raised also the difficult question of the legal status of unreasonable customs in the common law. On the other hand, emphasising the courts' position in determining reasonableness raised the question as to what gave the 'reasonableness' as determined by the courts through their practices its authoritative quality, particularly as the static sense of continuity associated with custom was weakened. In the context of seventeenth century English politics, where the King was claiming a divine right to govern directly from God, and Parliament claimed to better represent the nation, the common law's 'connatural' bond with the nation evidenced by its continuity through history was the best way secure its authority and jurisdiction, if not an accurate reflection of its actual practice.

The association between common law and custom by the authors covered in this section represent an important phase in thinking about the interaction between legal order and society. As we have seen there was a strong nationalist bent to the way these authors perceived the authority of the common law, believing it to be the institution with the best claim to be identical or 'connatural' with the nation. This is occasionally expressed in terms of law's responsiveness to society. There was the imagining of the common law as not merely statically reflecting society, but as growing with and responding to its development. As such the identity of the common law with society was occasionally stressed in terms of the former's adaptability. Within such a context the aspect of custom as a reasonable usage, rather than mere continuity, was, at least implicitly, employed. However, despite these concessions to responsiveness and adaptability, the emphasis remained strongly upon common law as custom, and custom as continuity. By emphasising its continuity the common law grounded its historical claim to a superior jurisdiction and independence from, if not control over, Parliament and King.

Underlying this tension between continuity and adaptability in custom were two competing visions of the common law's authority developed in response to transformations in the relation between legal order and society. The dominant theme of continuity expressed the relation between legal order and society by articulating an identity between the two through evidence of its fundamentally unchanged state throughout history. However, as indicated by the acknowledgement of the process of development and adaptation in the common law's history, this sense of continuity alone was incapable of fully capturing the nature of this interaction. Although the continuity of the common law may have expressed a strong identity between legal order and society in the abstract, it simultaneously overlooked an important dimension of the dynamic by which that identity became an important question to be answered in developing a concept of legal authority. As we saw in the previous section, the question of legal order's relation to society was posed by the breakdown in the belief in the equivalence between the two, in turn caused by an awareness of the problem of ordering in an increasingly complex and diverse social environment. Whereas emphasis upon continuity suggested that the problem this posed for imagining legal authority could be resolved by locating the interaction between legal order and society in a body of custom that expressed an identity between them transcending time, the acknowledgement of development and adaptation in the history of the common law and the role of reasonableness in its content spoke to an interaction that is worked upon more directly in the practice of the courts and would not be captured by such a move. The Cokean view of the common law's authority as located in 'tried reason' stated the tension that made the relation between legal order and society the fundamental problem for imagining legal authority, but lacked the resources to resolve it.

It is here that perhaps the biggest irony of the Cokean perspective lies. Despite basing the authority of the common law on its identity with the nation throughout history, the identity it claims appears to actually transcend history. If the move to custom was, as we saw with St German, informed by the inability of the law of reason's timeless abstractions to capture the increasing dynamism of the interaction between legal order and

society, by failing to articulate the process of adaptation in the common law, the Cokean perspective renders custom and the common law a timeless abstraction of the sort St German sought to move away from. Although the focus on custom as an embodiment of the nation evident in the perspectives covered in this section partially recognises the interaction between legal order and society, acknowledging the growing importance of law's function in representing society in light of its increasing complexity and the loss of any transcendent basis for order, they fail to provide any grounds for perceiving as authoritative the interpretive practices through which the courts exercised this function. It appears to assume the same equivalence between legal order and society that the very positing of the question of their relation presumes to be undermined. Coke clearly saw the need to identify the common law with society in a fundamentally unchanged body of custom as prior to any account of that identity as it is realised throughout history. It was this challenge that Selden and Hale were to take up.

6. Legal Authority and the Courts: Selden and Hale

This final section argues that it was Hale who first articulated a concept of legal authority adequate to the interaction between legal order and society evident in its practices. In contrast to the Cokean perspective discussed in the previous section, Hale developed an understanding of legal authority which could be seen to both locate the coherence of the legal order in its continuity through time whilst acknowledging the nature of its interaction with society. It is argued here that what makes this accommodation of the legal order's interaction with society possible in Hale's thought in a way which it was not in the Cokean perspective is a shift away from locating the authority of law in its sources and instead towards the nature of its practices. By doing so, Hale creates a space in which the practices surrounding the legal order's interaction with society concerning the representative function of law can potentially be understood as themselves an integral part of its authority.

Law's historicism and the history of English law

Before outlining the differences between Coke and Hale, it is important first to understand their similarities. Their political and scholarly objectives were broadly similar, even if the method they employed to achieve them were quite distinct. Although writing during different periods in the sixteenth and seventeenth centuries, both faced similar political battles, defending the jurisdiction of the common law against encroachment by either the Crown or Parliament. Moreover, both confronted the same task of developing an understanding of legal authority, and that of the common law in particular, where the interaction between legal order and society was highlighted by the various factors already discussed. Just as Coke's vision of the common law was intimately bound with the nation, Hale sought to argue the close connection between the common law and English society.

Hale sought to emphasise the particularity of English law against what he perceived as the reductionist features of more universal modes of thought found in some strains of natural and positivist law. Coke would have readily agreed with the sentiment that "there be things peculiar and proper to the state and condition of one people, that are not common to the state of another" and that "it is scarce possible to frame one judicial law for all people" expressed in Hale's rejection of a substantial, universal and immutable natural or divine law.³⁸⁶ Similarly, given the "great variety in the states dispositions and concerns of several people", although law may be "a most wise apt and suitable constitution to one people, would be utterly improper and inconvenient for another."³⁸⁷ Hale, much like Coke, sought to argue for the particular identity of English law, and both sought to locate it in its history.

³⁸⁶ Sir Matthew Hale, "Considerations Touching the Amendment or Alteration of Lawes," in *A Collection of Tracts Relative to the Law of England, from Manuscripts*, vol. 1 (Dublin: Printed for E. Lynch, W. Colles, G Burnet, W. Wilson, J. Exshaw, P. Byrne, H Whitestone, J.M. Davis, C. Lewis, J. Jones, and J. Moore, 1787), 259.

³⁸⁷ *Ibid.*, 260.

Although both Coke on the one hand and Hale and Selden on the other stressed the importance of English law's historical roots in appreciating its authority, the manner in which they did so were quite distinct. Whereas Coke stressed the antiquity of English law, especially the common law, as the source of its authority, both Selden and Hale rejected this for reasons rooted in their understanding of the nature of law. Selden's approach was to argue that all laws enjoyed the same antiquity. Understanding the law of nature as a small number of basic, abstract God-given commands, Selden argued that a "limited Law of Nature is the Law now used in every State."³⁸⁸ The first limitation occurred at the very beginning of human history "when men by Nature being civil Creatures, grew to plant a common society."³⁸⁹ As such, despite the diversity of laws and the difference between systems across the world, each could be traced back to the same original point; all law had "come all out of one Fountain" that was nature.³⁹⁰ By reducing all laws to the same origin - the initial limitation of the law of nature brought upon by the first peopling of the land - Selden could argue that "all laws in general are originally equally ancient" and thus that "[l]ittle then follows in Point of Honour or Excellency, specially to be attributed to the Laws of a Nation in general, by an Argument thus drawn from Difference of Antiquity which in Substance is alike in all."³⁹¹ This attempt to move away from antiquity as a useful or relevant standard to understand and judge law by making it meaningless seemed to be aimed directly at common lawyers like Coke who, for whatever purposes, sought to locate the strength and authority of law in its antiquity.

Having questioned the value of 'antiquity' as a relevant standard by reducing all law to essentially the same origin, Hale and Selden set themselves the task of explaining how diverse systems and laws emerged and developed throughout history. In the broadest terms, the challenge was how to identify law as continuous in the context of a historicism that presumed diversity between systems and development within them. It was a question of tracing how through history "[d]iverse Nations...make their diverse Laws to grow to what they are, out of one and the same Root", how those 'limitations' upon the law of nature

³⁸⁸ Fortesque, *De Laudibus Legum Angliae*, 51–52.

³⁸⁹ *Ibid.*

³⁹⁰ *Ibid.*

³⁹¹ *Ibid.*

that occurred with the beginning of society were made and “then increased, altered, interpreted and brought to what they now are”.³⁹² This was a problem Coke never directly encountered given his tendency to imagine the bond between the common law and the English nation as existing beyond time, with the distinctiveness of English law from other systems transcending history rather than being a product of it. For Hale and Selden, however, by challenging Coke’s antiquity they set themselves the fundamental challenge of envisioning law’s continuity where history was both the source of the identity of systems and their differentiation.

The limits of Selden and Hale’s positivist history of law

Selden and Hale both characterise this history in two ways. The first speaks to a loosely ‘positivist’ conception of the history of English law. We already noted earlier Selden’s emphasis on the essential nature of law as posited, stating that “Laws are not without their Makers and their Guardians”.³⁹³ Elsewhere, discussing the law of nature, he asks: “how should I know I ought not to steal, I ought not to commit adultery, unless somebody had told me so? Surely it is because I have been told so: it is not because I think I ought not to do them, nor because you think I ought not; if so, our minds might change. Whence then comes the restraint? From a higher power; nothing else can bind.”³⁹⁴ Hale similarly adopts this image of law as posited, arguing that laws are “Institutions introduced by the will and consent of others implicitly by Custom and usage, or Explicitly by written Laws or Acts of Parliament.”³⁹⁵ This is illustrated in his denial of a Hobbesian right of sovereignty and his justification of the imposition of legal limits upon the exercise of the Crown prerogative. In outlining the historical nature of the English constitution, he characterises the “Original Institution of the Government” as “Settled at first by the Consent of the Governors and Governed”, and subsequent developments as “Concessions and

³⁹² Ibid.

³⁹³ Selden, “Jani Anglorum Facies Altera,” 93.

³⁹⁴ John Selden, *Table Talk: Being the Discourses of John Selden* (London: Printed for and under the direction of G. Cawthorn, 1797), 90.

³⁹⁵ Pollock, “Sir Matthew Hale on Hobbes,” 292.

Mutual Agreement between the Governors and the Governed” by which “the Sovereignty of the Governor is variously Modified according to the Tenor and purport of such Pacts and Concessions Subsequent to the Institution of the Government.”³⁹⁶ In contrast to Coke’s emphasis on a continuity transcending history, Selden and Hale explicitly incorporate a sense of development in the history of English law (and in all law), starting with the initial limitation of natural law and subsequent development in the positing of new laws by institutions or, in the case of the constitution, the making and modification of pacts and agreements between governors and governed.

Although Hale and Selden’s emphasis upon the positing of law differs markedly from Coke’s conception of law as artificial reason, in some important respects it does not necessarily challenge his thesis on the history of law, nor respond to the difficulties encountered by it. If Coke was to be believed that the present-day king’s courts could have their lineage traced back to the courts found in the earliest records of English society, it could feasibly argued that the initial limitation of natural law or ‘Original Institution’ created by compact was to create the common law and its courts. Coke’s ambition to secure the superior jurisdiction of the common law courts could be secured equally within Hale and Selden’s framework as his own. Rather than grounding the authority of the common law on the superiority of its wisdom and reason evidenced by its continuity ‘time out of mind’, it is instead grounded on the continuing validity of the ‘Original Institution’ which granted it authority.

This would seemingly circumvent some of the problems encountered by the Cokean perspective in the tension between continuity and adaptability. Rather than arguing for a continuity in the matter of the common law, which as we have seen was immediately brought into tension with courts’ function in determining ‘reasonableness’, Hale and Selden’s perspective necessitates tracing only the continuity of the ‘Original Institution’ establishing the common law courts. The formal authority of the common law courts thus established, any adaptation and development of the common law undertaken by those

³⁹⁶ Ibid., 294–295.

courts, including those made in the name of 'reasonableness', can be traced at least to the continuity of this initial agreement. Similarly any legal powers claimed by the king or Parliament could feasibly be considered under the supervision of the courts, those powers being enjoyed only as a consequence of some historical grant or recognition by the common law courts empowered by the initial agreement.

However, even if the spurious history tracing the common law courts lineage back to the very beginnings of society in England were taken for truth, this would be to replicate the tension evident in Coke's argument rather than resolve it. By focussing on the continuity of an agreement granting the formal authority of the court, rather than the matter of the common law in its application, the problem is simply moved to a more general and abstract level rather than resolved. As we have seen, the difficulty underlying Coke's argument was how to incorporate practices associated with the interaction between legal order and society into an understanding of the authority of the common law and its overarching coherence. Just as Coke tried resolve this tension by presenting the matter of the common law at such a level of abstraction that it failed to account for the actual practices of court developing and applying the law, so moving the question of continuity to the level of an original agreement establishing the courts would similarly rely on the same transcendent sense of continuity through time, thus failing also to account for these practices.

The challenge for imagining the authority of the common law during this period was not simply the level at which to locate the law's continuity but the concept of continuity itself. In moving from the substance of the common law to the initial agreement establishing the courts, one timeless abstraction is simply replaced with another. The method of envisioning the interaction between legal order and society is the same, as are the problems inherent to it. Just as Coke's understanding of custom made law equivalent to society by the transcendent continuity of custom, so the positivist history makes law and society equivalent in the initial positive enactment. As we have seen, this tactic may speak to the fact that the relation between law and society had become a fundamental basis for envisioning legal order, but it does so by trying to transcend the initial problem of non-

equivalence between law and society and the legal practices that sprung up around it. With these points in mind, it is uncertain to what extent Selden and Hale's 'positivist' history of English law alone signifies a major break with Coke.

Temporality and continuity: Hale against Coke

Despite making its initial positing a key part of the nature and history of law, in places Hale also appears to question the possibility of understanding the history of English law in just such terms. For example, when discussing where to look for the details of the English constitution, Hale follows the structure of his thought outlined above and suggests going back to the "Original Institution of the Government when Settled at first by the Consent of the Governors and Governed" but follows that "this is difficult to be found in Ancient Governments...because the Original Instrument of that Institution is hardly to be found".³⁹⁷ Elsewhere he elaborates along similar lines that "we have not any clear and certain monuments of the original foundation of the English kingdom, or state; when, and by whom, and how it came to be planted....And since we cannot know the original of the planting of this kingdom, we cannot certainly know the original of the laws thereof".³⁹⁸ Speaking of law more generally, referring to attempts to identify different laws as those of particular nations, Hale not only concedes that "it is almost an impossible peice of chymistry to reduce every *Caput Legis* to its true original" but follows by affirming that "[n]either was it, nor is it much material which of these is their original."³⁹⁹

If the act of positing and the making of the initial agreement were as vital to Hale's understanding of the nature of law as is implied above, then these practical difficulties would seriously undermine his ability to articulate such a history of English law or an account of its authority. However, his comments on the role of custom in relation to the

³⁹⁷ Ibid.

³⁹⁸ Hale, *The History of the Common Law of England*, 59.

³⁹⁹ Ibid., 63.

English constitution would suggest they are not necessarily so vital. For example in citing the legal consequences of “long usage and frequent Concessions & Confirmations of Princes”, Hale states they can form a part of the constitution “*as if* an Authentic Instrument of the first Articles of the English Government were Extant.”⁴⁰⁰ The suggested ease with which a legal system can continue to operate without such an ‘Authentic Instrument’ seemingly implies that the ‘Original Institution’ is more an effect of a more fundamental dimension of law’s continuity, rather than an actual concrete event.

Selden and Hale present a second image of law in relation to history and time, one which appears more fundamental than the positivist history described above and which speaks much more directly to the problem encountered by Coke. It portrays the history of English law not so much as a disjointed series of posited laws or agreements as encountered above, but instead as a continuous process of development and growth. For example, after the initial limitation of the law of nature that marks law’s origin, Selden describes a process by which such limitations are “then increased, altered, interpreted and brought to what they now are”, elsewhere commenting in similar terms how laws “*grow* to what they are”.⁴⁰¹

However, it is in Hale’s work that this process of growth and development in the law is articulated in the greatest detail. He states that the difficulty of discovering the original of laws and government stems not merely from any practical inconvenience, such as records being lost in the mists of time, but from “the nature of laws themselves in general”.⁴⁰² It being the nature of laws that they are “accommodated to the conditions, exigencies, and conveniences of the people...as those exigencies and conveniences do insensibly grow upon the people, so many times *there grows insensibly a variation of laws*, especially in a long tract of time.”⁴⁰³ This image of law as a process of almost organic growth is portrayed

⁴⁰⁰ Pollock, “Sir Matthew Hale on Hobbes,” 300–301.

⁴⁰¹ Fortesque, *De Laudibus Legum Angliae*, 52.

⁴⁰² Hale, *The History of the Common Law of England*, 57.

⁴⁰³ *Ibid.*, 57–58.

elsewhere when Hale states that “it is very evident to every day’s experience, that laws, the further they go from their original institution, grow the larger, and the more numerous.”⁴⁰⁴

By envisioning the history of English law in terms of a continuous process of development rather than a series of positing acts Hale directly confronted the difficulties faced by Coke and substantiated the view that antiquity was no longer a useful standard for understanding the source or authority of law. Whereas the positivist history only undermined the usefulness of antiquity by reducing all law to, hypothetically at least, the same origin in the initial limitation of the law of nature and thus the same antiquity, this second image strikes at the understanding of law’s temporality and continuity presumed by antiquity. Following an observation on the insensible variation of laws through time, Hale comments that “they being only partial and successive, we may with just reason say, they are the same English laws now, that they were six hundred years since” comparing it with the Argonauts ship which was “the same when it returned home, as it was when it went out; though in that long voyage it had successive amendments, and scarce came back with any of its former materials”, and the human body, which remains the same although “in a tract of seven years, the body has scarce any of the same material substance it had before.”⁴⁰⁵ Touching again upon how law develops and grows alongside the exigencies of society, Hale observes that “if a man could at this day have the prospects of all the laws of the Britons, before any invasion upon them, it would be impossible to say, which of them were new and which were old; and the several seasons and periods of time wherein every law took its rise and original”.⁴⁰⁶

This second image of law’s continuity is quite distinct from that employed by Coke’s notion of antiquity. Coke’s search for antiquity took time as the source of rupture and located the continuity of law in the absence of its effects. As such it was difficult to incorporate the process ‘fining and refining’ into his narrative of the law’s antiquity. By

⁴⁰⁴ Ibid., 60.

⁴⁰⁵ Ibid., 58–59.

⁴⁰⁶ Ibid., 60.

contrast Hale acknowledged this process but saw continuity as possible despite alterations which may have occurred throughout time. Not merely was continuity possible despite change, but Hale's frequent references to how growth and responsiveness were part of the nature of law suggests that these processes were very much inherent to law's continuity. This continuity in the process of growth does not seem to be merely located at a more abstract or general level, as it was in the positivist history encountered above. Rather than locating it at a level where we can trace the mere absence of time's effects, Hale seemingly imagines continuity as constructed within an inescapable engagement with time.

Hale's notion of continuity speaks more directly to the dynamics that made the relation between legal order and society a fundamental problem for understanding legal authority. It acknowledges that where law is increasingly perceived as non-equivalent to society its continuity cannot be resolved merely by making the presumption of such equivalence transcendent. This was precisely what was at work in Coke's notion of continuity where the equivalence between law and society was presumed and made transcendent in his notion of a custom unchanged by time. By contrast in Hale's notion of continuity the non-equivalence of law and society is never transcended as such. This non-equivalence is instead recognised as the very condition for the question and thus the possibility of law's continuity. It is the dynamic that moves the history of law – society's potential to exceed beyond the representation of law, and the law, as a consequence of presuming this potential, always respectively orientated towards representation and development. This non-equivalence thus lies at the very heart of Hale's concept of law, making the interaction between legal order and society not a problem which could be transcended with a 'timeless' solution in God, nature or custom, but rather the animating problem at the heart of law in general.

Legal authority and the courts: from source to practice

This specific sense of continuity Hale attributed to the common law outlined above, and which shapes his understanding of the common law's authority, is developed from an awareness of the interaction between legal order and society evident in the practice of the courts. This can best be illustrated by seeing how Hale's view on the customary foundations of the common law differs from that seen in the Cokean perspective. Given that the Cokean perspective is typically associated with the veneration of court practice, it ironically fails to incorporate such practices as an active part of its view of the common law's authority deriving from its customary foundations. Davies, for example, focuses on a continuity of customary practice amongst the people as the source of the common law, stating that a custom will only become law if it has been "confirmed by common use and practice, and continued time out of mind" and elsewhere that a custom will not become law "until it hath been tried and approved time out of mind".⁴⁰⁷ On this perspective the courts' role appears to be restricted to recognising and enforcing a custom that has, through the process of continuous usage outside of the courts, become a part of the common law. The structure of the argument is that continuity exists in the customary source of the common law, which is subsequently recognised and enforced by the courts. The courts' role in developing the common law is thus marginalised.

Similar sentiments are found in Hedley and Coke. Although Hedley emphasises the role of the courts in his definition of the common law as "a reasonable usage, throughout the whole realm, approved time out of mind in the king's courts of records", when it is considered that 'reasonable usage' is evidenced by a "continuance but for some certain time...whereof the memory of man is not to the contrary, time out of mind, such time as will beget a custom" he, like Davies, seems to resort to locating continuity in the usage of the people. Coke's position is more difficult, though effectively follows the same structure. Although Coke may be referencing the practice of the courts rather than the people when he speaks of the common law as "proved and approved by continual experience", this argument is used to reinforce the point that they "cannot without great hazard and danger be altered or changed." The effect is to transform the continuous historical practice of the

⁴⁰⁷ Davies, *Le Primer Report Des Cases et Matters En Ley Resolues et Adjudges En Les Courts Del Roy En Ireland*, Preface.

courts into a custom, an authoritative source that the present court is restricted to recognising and applying.

On the Cokean view therefore the basic structure of the common law appears to be understood as a customary source with a pre-existing continuity outside the court, recognised and applied by the courts. Despite Hedley's awareness of the tension between custom and reasonableness, and Coke's focus on the practice of the courts rather than 'the people', the tendency ultimately is to collapse the continuity of the common law into the continuity of its customary source, from which it ultimately derives its authority, overlooking the practice of the courts in developing and applying the law in the process.

As the following passage demonstrates, Hale's perspective on the common law's relation to its sources is markedly different, with legal authority much more intertwined with court practice:

First, the common law does determine what of those customs are good and reasonable, and what are unreasonable and void. Secondly, the common law gives to those customs that it adjudges reasonable, the force and efficacy of their obligation. Thirdly, the common law determines what is that continuance of time, that is sufficient to make such a custom. Fourthly, the common law does interpose and authoritatively decide the exposition, limits and extension of such customs.⁴⁰⁸

Here Hale reverses Coke's perspective on the common law. Whereas Coke focuses on the pre-existing continuity of the custom that makes it a source of the common law, Hale identifies the common law more directly with the practice of the courts in determining the legal force of a custom.

⁴⁰⁸ Hale, *The History of the Common Law of England*, 25–26.

The shift in emphasis away from sources towards the practice of the courts is evident elsewhere. After commenting that it is “an impossible piece of chymistry to reduce every *Caput Legis* to its true original” he states that laws “became laws, and binding in this kingdom, by virtue only of their being received here and approved here.” Similarly, on the variety of foreign and domestic influences on the development of English laws he states that “their obligations arise not from their matter”, by which we could interpret ‘matter’ incorporating for Hale both its substance and its formal continuity, “but from their admission and reception, and authorisation in this kingdom”, a process he sees as happening “by virtue of the common law”.⁴⁰⁹ This shift away from sources, especially custom, is evidenced further by his rather loose definition of customary practice in his discussion of their impact upon the English constitution, stating that it either “carries in itself a facile Consent of the Governors and Governed” or “is at least Evidence or Interpretation of the Original Institution”.⁴¹⁰ It seems quite unlikely that Coke, Davies or Hedley, for whom custom was the ultimate source of the substance and authority of the common law, would be satisfied with such an equivocal characterisation.

It would seem that Hale’s understanding of law’s continuity as the product of responsiveness to time, and time defined by the dynamic created by law’s non-equivalence to society, is closely associated to the shift in emphasis from customary sources to court practice. For Hale, the common law is not a body of custom existing continuously since ‘time out of mind’, passively recognised and applied by the courts, but is firmly bound up with the courts’ practices in determining the reasonableness of customs, interpretively engaged with the world so as to define the scope of their extension and identify their limits, locating them within the legal order understood as an ongoing project. If we are to locate Hale’s sense of continuity in a particular feature of the legal order it is in those court practices at the very interface between law and fact, where the non-equivalence between law and society are confronted and the interaction between legal order and society is given its most concrete expression.

⁴⁰⁹ Ibid., 64–65.

⁴¹⁰ Pollock, “Sir Matthew Hale on Hobbes,” 294–295.

7. Conclusion

In the history of common law jurisprudence, Hale's work marks the end-point of an important transitory period, and the beginning of another. His understanding of legal authority reflects an awareness of transformations in law and English society occurring for over a century, both in the nature and practice of legal reasoning and in the theorising of the legal order's relation to society more generally. Perhaps as a consequence of writing in a different (although equally fractious) political environment from his predecessors, Hale, liberated from traditional assumptions about the nature of law that inhibited his predecessors, articulated a concept of legal authority equivalent to the challenges posed during the previous century. He identified that where diversity and complexity had made 'society' itself the primary object of legal order, legal authority could no longer be reduced to a question of sources. Attempts to locate legal authority in a source transcending its realisation, such as Coke's common law existing since 'time out of mind', could not account for the changing nature of the practices surrounding the actual functioning of the law.

In this light Hale acknowledged that the courts were not merely an effect of the law as the incidental location of its application, but the essence of it. The courts were becoming consciously 'social institutions' where emphasis was increasingly shifting away from the mere application of law and instead towards practices with representing society itself as a primary function. Associated with the breakdown of the assumption at the general level of an inherent equivalence between the 'order' envisioned by the law and that of the world was an awareness of the contingency in the interaction between law and fact in the court. The work of the court was increasingly geared towards exploring and debating this contingency, determining it not only for the purposes of ruling in the present case, but to locate it within law's ongoing project of representing and ordering society. Accompanying this move was a change in the nature of the practices within the court and increased focus

on them when theorising the law at a general level. In the tradition of the common law, it was Hale who first explicitly incorporated these developments into his understanding of law.

This chapter began with an analysis of the emergence of the criminal mind in the works of Coke and Hale. There it was argued that these authors gave expression to a specific sense of the criminal mind in which rather than representing a condition of liability distinct from external aspects of conduct otherwise defined by a particular rule, it formed a source of evidence to be drawn upon in giving specific shape and substance to the conduct identified and described by that rule. It was suggested that the criminal mind was therefore a fundamentally interpretive concept, coming into prominence in the interpretation and application of the rule in light of evidence presented before the court of the particular circumstances surrounding the alleged breach of the rule viewed through the prism of the accused's state of mind. It was further argued that this sense of the criminal mind was specifically associated with the articulation of criminal offences in the form of general and abstract rules prohibiting conduct which was deemed to interfere with interests identified and defined by the law. In this sense the notion of criminality expressed by the criminal mind was distinguished from that of manifest criminality insofar as the criminality of conduct was not determined directly the community's supposed moral experience of it as criminal but was in-part constituted by interference with interests identified and defined independently by the law.

However, this analysis alone only gave us a partial impression of the sense of criminality expressed by the notion of the criminal mind in Coke and Hale. The criminal mind as envisioned by these authors not being conceived as a formally distinct condition of liability but as by nature evidential, the idea of subjective criminality as put forward by Fletcher was not available to us. Moreover, the specific scope and substance of the rule was not realised until interpreted in light of evidence presented in court as to the defendant's state of mind, nor was it possible to draw upon the fact of enactment or imposition of the rule by the legislature or the courts as a basis for understanding the sense of criminality expressed by the notion of the criminal mind.

With an understanding of the criminal mind as being specifically associated with the practice of interpreting and applying general and abstract rules, in order to reveal the sense of criminality embodied in the criminal mind the rest of this chapter located the interpretive practice with which it is associated within more general reflections on the nature of law, focussing specifically on developments in common law theory in the seventeenth century. Here it was shown first how the nature of legal order in general was coming to be viewed as comprised of general and abstract rules and how this focused attention on how natural and social order was represented within these rules through practices of interpretation and application in the court. Second, it was shown how developments in common law theory throughout the seventeenth century could be viewed as attempts to account for and rationalise these practices within a customary concept of law rooted in the life of the community. It was shown that these interpretive practices were reimagined as integral to the historical continuity that customary conceptions claim for law in the face of its evident change and development over time in response to broader social transformations. Within this customary concept of law these interpretive practices were therefore conceived as the point at which the life of the community as ordered by abstract and general rules drew upon the experience of that community as presented in the courtroom and were concretely realised themselves as a part of the life of the community.

A concrete connection can therefore be made between the criminal mind as it emerged in Coke and Hale's writings on the criminal law and the customary concept of law developing throughout the seventeenth century. Insofar as these authors envisioned the criminal mind as an interpretive concept integral to the process of interpreting and applying rules describing criminal conduct in general and abstract form, it spoke directly to the sense in which seventeenth century common law theory came to view interpretive practices as the means through which law was realised as a part of the life of the community. The criminal mind functioned as a conduit through which criminality as experienced and perceived within the community was drawn upon in determining the precise scope and substance of those general and abstract rules through which the law identified and defined

interests to be protected, in the process rooting these rules back into the life of the community. If interpretive practices surrounding general and abstract rules were a symbolic expression of the customary concept of law developing within common law theory throughout the seventeenth century, the criminal mind was therefore a symbolic expression of that concept of law within the criminal law.

This connection between the criminal mind as it emerged in the writings of Coke and Hale and the customary concept of law developing in the seventeenth century having been established, the concept of criminality embodied by the criminal mind and the abstract vision of the person underlying it which this thesis is developing takes on a more concrete shape. It is neither imposed upon the community by positive rules and enactments nor does it reside directly in the moral experience of the community. Rather, it is forged at the point where these two meet. It is a distinctly formless sense of criminality realised primarily within the interpretive practices of the court where criminality as constituted by rules protecting interests identified and defined by the law comes into contact with criminality as constituted by the experience and perception of the community. The criminal mind as evidence to be drawn upon in the interpretation and application of rules describing criminal conduct makes the community's experience and perception of lawlessness an integral component in identifying conduct deemed criminal, rooting those rules within the life of the community. On the other hand, the experience and perception of the community is itself shaped by the fact that it is increasingly ordered and regulated by general and abstract rules, shaping in turn the experience of lawlessness which is drawn upon in interpreting those rules. The criminal mind can therefore be seen to embody a concept of criminality specific to a stage in the historical development of the criminal law where the life of the community was increasingly ordered and regulated by general and abstract rules and interpreted in terms of those rules, whilst these rules themselves according to the customary concept of law central to common law theory needed themselves to be interpreted in terms of the life of the community and realised as a part of them. The criminal mind and the sense of lawlessness it captured was the symbolic expression of that process, drawing upon both crime as the product of imposition and crime as residing in the moral experience of the community whilst being reducible to neither. Although this sense

of the criminal mind and the concept of criminality developed over the last two chapters can be specifically associated with developments in the seventeenth century where it has its origins, we will see in the next chapter that even in the context of the significant transformations the criminal law underwent in the course of the eighteenth and early nineteenth centuries, it continued to have a powerful hold over understandings of the nature of criminal law and was extensively drawn upon in responding to problems confronted as a result of legal and social developments throughout this period.

CHAPTER FOUR

THE LAWLESS SPIRIT:

THE ABSTRACT INDIVIDUAL AND THE ORDER OF MODERN CRIMINAL LAW

1. Introduction

It has so far been argued that the origins of the abstract individual can be traced back to the seventeenth-century. In revealing these origins the emergence of the abstract individual has been specifically related to key developments in seventeenth century criminal law concerning its practice and theory. The emergence of the abstract individual has been identified with the increasing importance of general and abstract rules in the criminal law prohibiting conduct interfering with legally protected interests. That criminality was in part constituted by the breach of such rules placed traditional notions of criminality under strain as the identity between the sense of criminality residing in the moral experience of the community and criminality as defined by the law was disrupted. In its place emerged a

concept of criminality which found its symbolic expression in the abstract individual embodied by the notion of the criminal mind. This notion of the criminal mind took a particular shape. Although an integral component of proving criminal conduct it did not comprise a formally distinct condition of liability subject to precise definition and analysis. Rather, the criminal mind was envisioned as a source of evidence to be drawn upon in interpreting rules defining conduct and presented to the jury in determining whether a particular course of conduct in fact constituted a breach of the rule. The criminal mind was therefore a distinctly interpretive concept, constituted in relation to interests identified and defined by the law but realised only within the interpretive practices of the court where the precise scope and substance of general and abstract rules prohibiting interference with those interests was worked out. The criminal mind was moreover the symbolic expression of a concept of criminality specific to an order of criminal law comprised by these general and abstract rules – a conduit through which the function of these rules in regulating and ordering the life of the community through the protection of interests identified and defined by the law both drew upon and was realised within the life and experience of the community.

In turning towards the eighteenth and early nineteenth-centuries this chapter aims to illustrate how the notion of the criminal mind and the concept of criminality it embodied which has so far been articulated in relation to developments in the seventeenth-century was drawn upon in this later period. As will be outlined by Section 2 in further detail, the eighteenth and early-nineteenth centuries are of particular importance to the argument developed in the thesis insofar as it is commonly associated with major legal and social developments perceived to lay the foundations of the defining features of the modern system of criminal law. First, intense legislative activity throughout this period meant that statute became a prominent if not the primary source of criminal law. That crime was in part constituted by rules imposed upon the community became an inescapable reality to be confronted in the theory and practice of criminal law, rendering obsolete or subject to significant modification views of crime as a direct product of the experience of the community. Second, by the end of the eighteenth century there was a growing perception that this period of intense legislative activity had left the criminal law in an incoherent and

disorganised state, marked not only by a draconian and inhumane application of capital punishment to an array of minor offences, but also by inconsistencies and illogical distinctions created as Parliament's ad-hoc and piecemeal legislative interventions created new offences of narrow scope in response to particular concerns or crises. The need for reform was felt acutely, fostering intense interest in theories on the nature and purpose of criminal law and punishment to be drawn upon in seeking to put the law onto a rational and principled footing. In illustrating how the notion of the criminal mind developed in the thesis so far was drawn upon in responding to these developments it aims to reinforce the argument that the origins of the abstract individual of modern criminal law lie in the seventeenth century.

The focus on the eighteenth and early nineteenth centuries also provides an opportunity to clarify the distinctiveness of the sense of the abstract individual which is being put forward in the thesis. As was noted above, this period has often been looked to as the moment when the ideas and practices which would come to define modern criminal law began to emerge. Norrie puts forward such a view, whose perspective on the origins of the abstract individual we explored in detail in Chapter One. It will be recalled that Norrie identified the emergence of the abstract individual with two key developments. The first was the growth of commercial and industrial capitalism in the late eighteenth and early nineteenth centuries in which criminal law became a central institution for protecting middle-class interests, especially private property rights. The second was the body of moral and political philosophy emerging from the Enlightenment, bringing to the fore ideas of freedom, reason and responsibility grounded in the concept of the abstract individual, ideas which would influence leading intellectual figures in the movement for reform of the criminal law in England and which would go on to shape the ideology of individual responsibility at the core of modern criminal law. An implication of the argument developed in the thesis so far is that Norrie is mistaken in locating the origins of the abstract individual in this later period, and as a result of overlooking how the abstract individual was forged by earlier developments in the seventeenth century fails to fully capture the concept of criminality it embodies.

The nature of the difference between the argument of the thesis and Norrie's is neatly illustrated by a passage where Norrie asks "One hundred and fifty years before the penal reform movement, English lawyers were developing a discourse of individual rights, logic and legality. But why did it take so long to feed the common law tradition into the criminal law?"⁴¹¹ The thesis has so far sought to highlight that it is precisely in the common law and with figures like Coke that the origins of the abstract individual are to be found. The notions of 'individual rights, logic and legality' did find their way into the criminal law from the common law, but probably not in the sense Norrie in this passage is referring too. Whereas Norrie looks for this to be expressed in a form of moral and political individualism influenced by Enlightenment philosophy, it has been argued that the primary expression of individual rights, logic and legality in the common law is that of regulation and ordering of the community through general and abstract rules developed through the courts. It is from this perspective that the concept of the abstract individual has been developed in this thesis, and it is suggested that it is from this perspective that the concept of criminality embodied by the abstract individual can best be captured. This chapter seeks to show that this concept of the abstract individual which has so far been shown to be well-established in seventeenth century criminal law and expressive of a common law view on the nature of law played a key role in attempts to bring order and rationality to the law in face of challenges created by legal and social developments in the eighteenth and early-nineteenth centuries.

Up to now two important steps have been made in the argument concerning the abstract individual of modern criminal law we are trying to develop through the thesis. The first tentatively identifies the origins of the abstract individual of modern criminal law in an understanding of legal order emerging during the seventeenth century. It was argued in Chapter Two that the manner in which received understandings of the overt-act were continuously undermined in the treason trials indicated a deeper lying problem the court had with representing the treasonous mind as a form of abstract thought about the person. Connections were then made between the problems confronted by the courts in this

⁴¹¹ Norrie, *Crime, Reason and History*, 25.

respect and a vision of legal order emerging in writings on legal method and legal reasoning during the period. This vision of legal order was noted for its increased awareness of the representative function of law insofar as it envisioned its practices as directed towards an interpretive engagement with the social world rather than the imposition of an order which was manifest or in some sense already existing.⁴¹² The second gives firmer definition to this vision of legal order by locating it firmly within the common law tradition. It was argued in Chapter Three that a parallel could be drawn between the dynamic of representing and ordering the social world associated with the vision of legal order identified and the tension between reasonableness and acceptance accompanying the identifying of custom as an important source of English law. Locating the common law origins of the legal order under consideration enabled further insights into its specific character, especially concerning its underlying concept of authority which it was seen to claim not on the basis of its source or its values, but in the capacity of its practices to construct order through the diversity of the social world.

Whilst the aim of the previous chapter was to contextualise the vision of the legal order with which abstract thought about the person in law was emerging within a broader tradition of common law thought, the focus of this final chapter returns squarely onto the abstract individual of modern criminal law by analysing its emergence in criminal law doctrine. This analysis is guided by themes already developed in the thesis so far concerning the identification of the abstract individual with both the common law and a vision of legal order emphasising the representative function of law. The common law origins of the abstract individual are acknowledged by tracing its emergence through the idea of a fundamental relationship between law and community and changes in that relationship. The chapter shows how the concept of the abstract individual developed in the thesis so far and identified with developments in seventeenth-century criminal law was drawn upon in the analysis and interpretation of the offences of arson and forgery, showing how the focus on abstract states of mind such as intent was driven by a desire to transform the sense of order residing in the community into an object of knowledge through which the courts and

⁴¹² The notion of 'manifest criminality' employed here and in the rest of this chapter is drawn from Fletcher, *Rethinking Criminal Law*.

the criminal law could exercise control more extensively by enabling a more detailed representation of the social relations through which the rights it protected were realised and enjoyed.

2. Forgery and Malicious Mischief in Eighteenth Century Law and Society

Since the publication of Leon Radzinowicz's four-volume *A History of English Criminal Law and Its Administration from 1750* in 1948, the subject of crime and the criminal law in eighteenth century England has attracted a considerable amount of interest.⁴¹³ Whilst the approach to eighteenth century criminal justice and criminal law adopted in this work was shaped by Radzinowicz's primary interest in developing a detailed account of the origins of the movement towards reform of these institutions later in the century and its development throughout the nineteenth century, the field of study has since developed to encompass a significantly broader range of methods and objectives. With the growth of social history as an academic discipline in the 1960s and 1970s, new perspectives emerged on the value of studying the criminal justice system of eighteenth century England, shifting away from a focus on the causes of its internal institutional development and instead towards examining what the operation of these institutions and the experiences of those who came into contact with them could reveal about the political and economic realities of eighteenth century English society itself. The first major step in this new direction can arguably be traced back to 1975 with the publication of two seminal works in the field; *Whigs and Hunters* by E.P. Thompson and *Albion's Fatal Tree*, an edited collection of essays from a group of authors whose works would dominate the field, including Thompson himself as

⁴¹³ Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750*, vol. 1 (London: Stevens, 1974).

well as Douglas Hay, who also edited the collection, and Peter Linebaugh.⁴¹⁴ In *Whigs and Hunters*, Thompson conducted a detailed analysis of the social and political origins of The Black Act, a notorious piece of legislation passed in 1723 extending the death penalty to a range of relatively minor offences involving destruction and theft of property and other activities such as going in disguise or 'blacking', with the aim of suppressing the Waltham Blacks and their ongoing plunder and destruction of royal forests and campaign of threats and violence against forest officials. From *Albion's Fatal Tree* the essay which arguably had the most last influence was Hay's entitled 'Property, Authority and the Criminal Law', in which Hay explores where and the purpose for which discretion was exercised at different stages of the accused's passage through the criminal justice system – from the decision to prosecute, to trial and conviction, and eventually to whether a sentence should be executed or mercy granted – in order to uncover what he considers a major paradox at the heart of eighteenth century criminal justice in the correspondence between a marked increase in the number of capital offences compared to the preceding Stuart period and a steady decline in the number of actual executions.⁴¹⁵

Both Thompson and Hay's works have been labelled a 'history from below' approach, giving prominence to evidence from diaries and other personal accounts in order to uncover how the criminal justice system was experienced by those coming into contact with it, especially the poor and dispossessed most likely to suffer at its hands.⁴¹⁶ In particular this evidence was interpreted through and laid the foundations for a broadly Marxian or Gramscian perspective in which the criminal law and its administration was conceived as a vital instrument in securing the interests of a proto-capitalist ruling class oligarchy who had consolidated their control of institutions of state since the Glorious Revolution, not only by violently imposing a system of exclusive property rights upon which the wealth and power of this class depended, but also legitimising this coercive enforcement of narrow class interests in the eyes of the exploited by exercising it through

⁴¹⁴ Thompson, *Whigs and Hunters*; Douglas Hay, ed., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London; New York: Verso, 2011).

⁴¹⁵ Hay, "Property, Authority and the Criminal Law."

⁴¹⁶ Joanna Innes and John Styles, "The Crime Wave: Recent Writing on Crime and Criminal Justice in Eighteenth-Century England," *The Journal of British Studies* 25, no. 4 (1986): 380–435.

the 'majesty' of the law and the promise of universal and equitable administration of these laws intrinsic to the notion of the 'rule of law'. Some aspects of the method employed in the 'history from below' approach have since come under significant challenge, as well as the fundamentally class-based analysis which informed its findings and conclusions. For example, John Beattie's work, whilst to some extent following in the social history tradition of Thompson and Hay of putting analysis of criminal behaviour into the service of revealing certain aspects of the nature and order of eighteenth century English society, turns away from attempts to uncover the social and political meaning of crime as experienced by the lower-classes and employs instead a positivist method in which crime is taken as a 'social fact' as evidenced by court records and links the incidence of these facts to others concerning broader political and economic developments in order to explain their fluctuation over periods of time.⁴¹⁷ Moreover, other authors have challenged the picture of a criminal justice system dominated by elites presented by these authors upon which their fundamentally class-based analysis of those institutions and conclusions as to their role in maintaining order in eighteenth century English society are founded. Peter King's large body of work on the exercise of discretion in the criminal justice system for example stands in marked contrast to that of Hay, showing the diversity in the social composition of those who used the criminal justice system and who participated and exercised influence at the different stages of its operation, offering evidence that a much wider range of factors shaped the exercise of discretion than the desire to reinforce the bonds of duty and obligation between the lower-classes and elites.⁴¹⁸ Finally, John Langbein has attacked the value of a Marxist theoretical framework for interpreting results, arguing that the identification of law as ideology renders the truth of its explanations of evidence self-fulfilling insofar as they are impossible to falsify, with any evidence challenging the general thesis that criminal law and its institutions operated to secure narrow class interests dismissed as an ideological concession to the lower-classes in order to secure its legitimacy.⁴¹⁹

⁴¹⁷ J. M. Beattie, "The Criminality of Women in Eighteenth Century England," *Journal of Social History* 8, no. 4 (1975): 80–116; J. M. Beattie, "The Pattern of Crime in England, 1660-1800," *Past and Present* 62, no. 1 (1974): 47–95; J. M. Beattie, *Crime and the Courts in England, 1660-1800* (Oxford: Clarendon Press, 1986).

⁴¹⁸ Peter King, *Crime, Justice and Discretion in England 1740-1820* (Oxford: Oxford University Press, 2000).

⁴¹⁹ John H Langbein, "Albion's Fatal Flaws," *Past and Present* 98, no. 1 (1983): 96–120.

In a 1986 article reflecting on how the field of research into the criminal justice system of eighteenth century England was developing, Innes and Styles noted a resurgence of interest in the sort of institutional history originally undertaken by Radzinowicz and away from the social histories explored above, forged by a growing scepticism about what the available sources could reveal about social experiences of crime or popular attitudes towards it and a more cautious approach to the construction of grand explanatory narratives explaining findings in light of more general transformative forces such as the emergence of capitalism or the industrial revolution.⁴²⁰ This has arguably led to richer and denser accounts of these institutions, illuminating their internal dynamics in which external political and economic interests or social transformations are not taken as determining factors in their design, operation and development, but rather are interpreted through the prism of the particular concerns and motivations of institutional actors marking the distinctiveness of these institutions as a whole. Moreover, the greater focus on institutions themselves enabled authors to break from the chronology traditionally dominating the field tying important developments to the industrial revolution later in the century, revealing more complex and sophisticated pictures of how these institutions operated earlier in the century. However, whilst the focus on institutions may mark a return to the approach embodied by Radzinowicz's work which marked the beginning of modern scholarly interest in eighteenth century criminal justice, the recent incarnation of the history of institutions is arguably one which is more contextually-aware, drawing upon large body quantitative and qualitative research into the place of crime and criminal justice in eighteenth century society in order to refine evaluations of institutional processes in light of an awareness of the 'disorder' that characterised their environment and the role these institutions played in their management.

In illustrating the role of the concept of the abstract individual developed in the thesis so far in developments during this period and elaborating upon the argument that at its core it reflected an understanding of criminality identified as the 'lawless spirit', the approach adopted in this chapter follows in the tradition of this contextually-informed

⁴²⁰ Innes and Styles, "The Crime Wave: Recent Writing on Crime and Criminal Justice in Eighteenth-Century England," 384–388.

institutional history. In line with the method adopted in the thesis so far, the emphasis is upon illuminating the internal logic of developments in the criminal law by analysing primarily legal materials, including treatises, judicial decisions, statutes and commentaries. The background against which the argument in this chapter is made and to which it aims to contribute to the understanding thereof is the increased use and importance of Parliamentary legislation in the area of criminal law throughout the eighteenth century, a familiar topic in the study of eighteenth century criminal justice. In particular, the chapter addresses itself to problems posed by the quantity and quality of the legislative output of Parliament during this period for theorists and commentators seeking to identify the rational and systematic quality defining and giving shape to the criminal law. The sheer number of statutory interventions in the criminal law during this period, as well as the notorious obscurity and inconsistency of its provisions, pushed into the foreground questions concerning the status of statutes which had long impinged upon general theoretical accounts of English law rooted in a common law tradition of legal thinking, revealing itself in inconsistencies and dilemmas as attempts were made to reconcile the political sovereignty of Parliament with a concept of law emphasising its customary foundation and development through the judicial practice of the courts.⁴²¹ As Lieberman has argued, the origins of a developed and sophisticated science of legislation was not confined to penal reformers such as Paley and Romilly, nor to Bentham and his followers, but already had a long tradition in English legal thought stretching back to Francis Bacon's original proposals for statutory consolidation, and was in full evidence in Blackstone's *Commentaries*.⁴²² For Blackstone himself, criminal law "simply provided another weighty body of evidence to demonstrate the destructive impact of the statute law" and criticism of it "could be accommodated easily and tidily within the common lawyer's conventional contrast between the wisdom of the common law and the failures of statute."⁴²³

⁴²¹ Postema, *Bentham and the Common Law Tradition*, 14–30; Michael Lobban, *The Common Law and English Jurisprudence 1760-1850* (Oxford: Clarendon Press, 1991), chap. 2.

⁴²² David Lieberman, *The Province of Legislation Determined* (Cambridge: Cambridge University Press, 1989), chap. 1 and 2.

⁴²³ *Ibid.*, 215.

Whilst this chapter does not focus on the development of a legislative science in English legal thought nor the movement for reform of the criminal law in particular, it does address the problems increased legislative activity was perceived to pose for the overarching coherence of criminal law and which can be considered to have given rise to those concerns. In particular it aims to show how the extensions of the criminal law imposed by successive statutory interventions, and the obscurities and inconsistencies they introduced, disrupted the structure and coherence of the criminal law built upon the settled foundations of the common law as envisioned in the classical treatises of Coke and Hale, and furthermore to illustrate how the major treatise writers of the eighteenth and early nineteenth centuries reconceptualised the fundamental categories of offences inherited from that period in order to impose a degree of order and system upon the substantive law. In doing so the chapter focuses on two general types of offences – forgery of both public and private documents, and a group of offences involving the destruction of private property labelled ‘malicious mischief’ which today would broadly come under the category of criminal damage. These two groups of offences are chosen partly for their obvious legal significance, being areas where the level of statutory intervention throughout the eighteenth century was particularly frequent and where the nature of these interventions in extending the criminal law to protect a greater variety of types of property posed particular problems for the clarity and consistency of the law.

With regards to forgery, it has been commented that it “might well be seen as the quintessential offence of the long eighteenth century.”⁴²⁴ Whilst accounts differ, it has been estimated that of the large number of capital statutes enacted by Parliament during the eighteenth century, up to a third of them concerned forgery.⁴²⁵ Whilst forgery first became the subject of statutory intervention in the Elizabethan era, an act of 1563 seeking to protect legal records and official documents touching upon ownership and transfer of land by increasing the severity of the punishment their forgery or untrue publishing was subjected too, it was only after the Glorious Revolution that we see a particularly intense

⁴²⁴ Randall McGowen, “Making the ‘Bloody Code’? Forgery Legislation in Eighteenth-Century England,” in *Law, Crime and English Society 1660-1830*, ed. Norma Landau (Cambridge: Cambridge University Press, 2002), 119.

⁴²⁵ Thomas Dogherty, *The Crown Circuit Assistant* (London, 1787), 360–362.

level of legislative activity. Twenty-nine acts concerning forgery were passed in the reign of William and Anne, another fifty-four acts during the reigns of George I and II, and 278 during the reign of George III. The nature of the development of forgery was very much piecemeal, built upon the successive enactment of provisions which were narrow and particular in scope responding to crises and perceived threats to order and security as they arose - creating new types of forgery or redefining older ones, extending it to new types of paper, or changing their punishment. The result was a series of offences which although taken individually may have reflected a coherent policy rationale, as a general body of law lacked any obvious principled coherence, distinctions existing between different types of forgeries or forgeries of different types of paper attracting punishments of varying levels of severity which were not obviously grounded in the moral quality of the forgery concerned nor the seriousness of its consequences.

Although if measured by the number of statutes the expansion of criminal law concerning destruction of property was more restrained than in forgery, the pattern of its development and the consequences of successive statutory intervention upon it were not dissimilar. With regards to arson, the creation of new offences extending the law beyond the traditional common law requirement that the property attacked be the dwelling-house of another began in the reign of Henry VIII, targeting in particular the burning of houses or barns storing corn and removing the benefit of clergy from such offences.⁴²⁶ By the eighteenth century the law was being extended significantly further, with new offences making not only the actual burning of property punishable but also the mere setting fire to it, as well as increasing the different types of property which were protected by arson, including mines and pits,⁴²⁷ mills and other buildings and engines used in trade or manufacturing,⁴²⁸ ships and vessels,⁴²⁹ and also the notorious provision in the Black Act making it a capital offence to burn “any hovel, cock, mow, or stack of corn, straw, hay or wood.”⁴³⁰ A large number of offences involving the destruction of property not involving

⁴²⁶ 23 Hen VIII c 1, 1531; 25 Hen VIII c 3, 1533.

⁴²⁷ 10 Geo II c 32, 1736.

⁴²⁸ 9 Geo III c 29, 1769; 52 Geo III c 130, 1812.

⁴²⁹ 12 Geo III c 24, 1772; 33 Geo III c 67, 1793.

⁴³⁰ 9 Geo I c 22, 1723.

arson where also created during this period, including the destruction of linen or cloth and any implements used in their manufacture,⁴³¹ the cutting of hop-binds and destruction of fishpond heads,⁴³² and the destruction of ships and the merchandise contained therein.⁴³³ As with forgery, the nature of these successive statutory interventions rendered it difficult to identify any general principles giving this area of law concerning arson and malicious mischief any coherence or consistency. Radzinowicz remarked that the state of the law concerning arson, and in particular the severity of punishment applied to different instances of it, could be “quoted as the example of the utter confusion to which the distortion of the scale of punishments ultimately leads”.⁴³⁴ The Black Act in particular stands as a symbolic representation of a perceived disregard legislators had for the impact the statutes they enacted had for the settled disposition of the law, Eden viewing it as evidence of the “vague, unfeeling, undistinguishing carelessness with which penal laws are composed” where “every idea of proportion is obliterated”.⁴³⁵ Two later acts passed in 1766 concerning arson which, not only did not make reference to the Black Act provisions of which these acts directly affected, but did not even make reference to each other, has been seen as “symptomatic of the unmethodical way in which such penal laws were drafted”.⁴³⁶

These brief summaries of how by means of the successive creation of new statutory offences the areas of forgery and arson developed and grew from their respective common law origins should give some indication as to why they have been chosen as the main areas of focus in this chapter. Whilst the specific dynamics informing the growth in these areas of criminal law are by no means universal, as other areas undergoing a similar process of course possess their own particular history, they do represent particularly prominent instances of a general phenomenon occurring in the criminal law during this period in which intense legislative activity creating a large number of new statutory offences with a myriad of different policy goals posed a challenge for theorists and lawyers seeking to identify a general, principled rationality in the law as their settled common law foundations came to

⁴³¹ 4 Geo III c 37, 1763; 22 Geo III c 40, 1782.

⁴³² 6 Geo II c 37, 1733.

⁴³³ 1 Anne St 2 c 9, 1701; 12 Anne St 2 c 18, 1713; 26 Geo II c 19, 1753.

⁴³⁴ Radzinowicz, *A History of English Criminal Law and Its Administration from 1750*, 1:8.

⁴³⁵ William Eden, *Principles of Penal Law* (London, 1771), 271–272.

⁴³⁶ Radzinowicz, *A History of English Criminal Law and Its Administration from 1750*, 1:10.

be fundamentally disrupted. Inasmuch as the aim of this chapter, and the thesis more generally, is to argue that the emergence of *mens rea* as a general principle of criminal law can be explained as the symbolic expression of a type of criminality embodied in the notion of the 'lawless spirit' arising as the relationship between criminal law and the community is reshaped as it is increasingly colonised by the state, exploring how *mens rea* concepts were employed to bring order to forgery and arson and destruction of property is a sound basis upon which to build that argument, being areas most prominently perceived to have been thrown into chaos as a consequence of statutory creations.

Insofar as it contributes to and illuminates the argument being made concerning the developments internal to the law which this chapter traces, some comment should also be made upon the social character and wider significance of the offences falling under the categories to be discussed. The creation of new forgery offences throughout the eighteenth century took place against the background of a period in which paper attained growing importance in English social, commercial and public life.⁴³⁷ Although paper had long been used in certain types of personal and commercial transactions, the end of the seventeenth century witnessed a revolution in finance where paper increasingly took a central place in English public and private finance. By the end of the seventeenth century legal protection was increasingly being extended to bills and notes by judicial rulings, and the Promissory Notes Act 1704 officially recognised promissory notes such as bills of exchange as negotiable instruments, providing that such notes made payable to order or the bearer created legally binding obligations and could be assigned by endorsement to new holders, and that these holders could sue for enforcement of their rights.⁴³⁸ The rise of the banks in London contributed to the explosion of paper, making it a part of not only extraordinary transactions, but also day-to-day purchases. By the end of the seventeenth century therefore paper itself was becoming a significant form of property upon which an increasing array of personal, commercial and public arrangements were dependant. What particular aspect of the increased social significance of paper led to the criminalisation of forging or

⁴³⁷ Randall McGowen, "From Pillory to Gallows: The Punishment of Forgery in the Age of the Financial Revolution," *Past and Present* 165 (1999): 110–111.

⁴³⁸ 3 & 4 Anne c 9, 1704.

other interference with it and the severe punishments often attached to such offences has been the subject of some debate. Hay interpreted it as part of the wider “division of property by terror” put into force by the criminal justice system of the eighteenth century, with the protection of property held in paper afforded by draconian forgery offences promoting the interests of a ruling class whose power and wealth rested upon the stability and security of commercial transactions.⁴³⁹ Other commentators have resisted this view of the increase in forgery offences as simply another example of Parliament acting in narrow class-interest or a mechanical, unmethodical reaction to particular crises. For example, Randall McGowen has argued that a myriad of different concerns informed the creation of new forgery offences and that to subsume them within a linear narrative about ‘the Bloody Code’ would be to distort their meaning, identifying the origins of this increased legislative activity targeting instruments relating to public finance in particular and its later spread to private instruments in a logic of development rooted firmly in securing public order and especially the state against the real or perceived threat posed by widespread forgery which undermined trust in those instruments, rather than being motivated by a desire to protect the private interests of any particular class.⁴⁴⁰

The social history of those offences comprised within the category of malicious mischief is somewhat less developed, attracting less attention than other areas such as forgery. However, whilst these offences as part of the general category of malicious mischief are yet to be subject to detailed study, specific offences within this category have been, either in the form of a history of a particular offence such as arson, or as part of enquiries into the origins of particular statutes encompassing a broad range of offences such as those offences relating to destruction of property in the Black Act. As with forgery, the main point at which authors have joined issue in exploring perceptions of the social significance of these offences and the basis upon which Parliament initially criminalised them and increased the severity of their punishment has been the extent to which this process reflected the use of the criminal justice system to secure ruling class interests or whether it reflected more general concerns to maintain public order. A classic statement of

⁴³⁹ Hay, “Property, Authority and the Criminal Law,” 21.

⁴⁴⁰ McGowen, “Making the ‘Bloody Code’? Forgery Legislation in Eighteenth-Century England,” 136.

the former position is presented by Thompson in *Whigs and Hunters*, where the creation of several new offences of arson and destruction of property alongside other offences created by the Black Act targeting attacks on the enclosed forests is presented as a design to criminalise customary use-rights the lower-classes traditionally enjoyed over such lands and suppress protest by the likes of the Blacks against their forced disappearance, and moreover to enforce the exclusive rights of the gentry to own and exploit the value of these enclosed spaces.⁴⁴¹ On matters such as popular attitudes towards conduct associated with the offences created by the Black Act, how these offences were actually prosecuted in the courts and the debates surrounding the original passing of the act the veracity of Thompson's conclusion that the act was an exercise in narrow self-interest on behalf of a particular segment of the ruling class has been subject to scrutiny, with a picture instead emerging of a concern to stabilise public order in the face of attacks which may not have held the socio-political meaning for perpetrators, victims or governors which Thompson attributes to them.⁴⁴² Beyond the Black Act, whilst certain of the offences created by Parliament during this period appear to be a response to particular instances of politically and economically motivated attacks on property, such as those targeting the burning or destruction of mines and mills, or cloth made from imported materials and the implements used to manufacture them, this does not necessarily warrant the conclusion that the growth of offences in this area reflected the criminal justice system operating as an instrument of class power. Certain parallels can be drawn with how forgery was extended to protect increasing numbers of different types of property, insofar as the prevailing perception that the strength of the state was tied to the security of the nation's commerce would have formed an equally convincing principle upon which to extend the protection of the law to important components of that commerce such as mines, mills, factories and harbours. Moreover, in relation to arson there is much evidence to suggest that it was fear of the destructive potential of fire in growing urban areas and the potential social disorder which it may give rise to that primarily shaped the extension of the offence, rather than the defence

⁴⁴¹ Thompson, *Whigs and Hunters*.

⁴⁴² John Broad, "Whigs and Deer-Stealers in Other Guises: A Return to the Origins of the Black Act," *Past and Present* 119 (1988): 56–72; Eveline Cruickshanks and Howard Erskine-Hill, "The Waltham Black Act and Jacobitism," *The Journal of British Studies* 24, no. 3 (1985): 358–65.

of private property as an economic interest as such.⁴⁴³ As McLynn has noted from surveys of chronicles, newspapers and other materials of the period, arson was “universally abhorred”,⁴⁴⁴ with its potentially devastating consequences perceived to justify the extensive criminalisation of such actions and their severe punishment, even amongst otherwise liberal reformers such as Eden.

Although the debates outlined above concerning the wider social and political meaning of the offences which are the subject of analysis in this chapter will not be directly engaged with, some comment upon them is important insofar as it serves to illuminate the concept of the ‘lawless spirit’ which this chapter seeks to evoke. It will be seen that the picture presented in this chapter of the lines along which those categories of offences developed in imposing a sense of order onto these areas of criminal law disrupted by the creation of new statutory offences, and in particular the role that *mens rea* concepts played in this process, sits uneasily with the view that criminal justice during this period was effectively an instrument of ruling class interest. It is the view of this author that not only does this interpretive framework fail to capture the myriad of concerns behind the creation and enforcement of these offences which extended beyond the protection of particular forms of property simply as economic interests but, as has been brought forward in more recent literature, also as means of pursuing the more general goals of maintaining public order and the security of the state, it is also difficult to accept that the extension of the principle of *mens rea* corresponding to this process was an ideological concession to individual freedom in a body of law which otherwise imposed draconian punishments for seemingly minor offences. In what follows it will be seen that a potentially more feasible interpretation of the increased emphasis upon the generality of the *mens rea* principle lies in viewing it as the continuation of the common law view of criminal law as rooted in the experience of the community during a period in which the notion of crime itself was being uprooted from its association with traditional common law offences as new offences were imposed with the aim of securing wider public and social goals. By distinguishing criminality

⁴⁴³ Frank McLynn, *Crime & Punishment in Eighteenth-Century England* (Oxford; New York: Oxford University Press, 1991), 83–87.

⁴⁴⁴ *Ibid.*, 84.

from on the one hand the breach of moral bonds and obligations residing within the community itself, embodied by the traditional common law concept of crime, and on the other hand from the instrumental and utilitarian calculations of the state as embodied by the imposition of statutory definitions of crime, *mens rea* came to refocus the idea of criminality upon attacks or endangerment of increasingly impersonal and abstract bonds of social and public order maintained by positive law which the community viewed the accused was responsible for and should be liable to punishment.

3. Manifest and Abstract Criminality

In the early definitions of arson and forgery a close association between the acts stipulated in the definition of the offence and the criminality which justifies the intervention of the law is posited. In arson this identity between the act and the malice is made quite explicit, with Coke stating that the “burning of houses being an hostile action, is presumed in law to be done maliciously for revenge, and as an enemy, to consume the same by fire in time of peace.”⁴⁴⁵ Here the act of burning the house of another clearly manifests the malice the law punishes. With regards to forgery the identity between the act and its criminality is more subtle. However it is indicated by Coke at the beginning of his discussion of forgery where he highlights its common basis with the branch of high treason concerning the counterfeiting of the great seal of the kings coin.⁴⁴⁶ The connection Coke makes between high treason and forgery tells us that its criminality is closely tied to the very act of counterfeiting. This impression is reinforced by Coke’s account of counterfeiting the king’s seal itself, where the overarching theme of the discussion is to distinguish actual counterfeiting from abuse of the great seal, with only the former constituting high treason.⁴⁴⁷ This tells us that the criminality of forgery was, to a large degree, symbolic and manifested by the act itself rather than its consequences. Counterfeiting of the great seal was adjudged high treason because, by usurping a sign of the king’s authority, it signalled

⁴⁴⁵ Coke, *The Third Part of the Institutes of the Laws of England*, 66.

⁴⁴⁶ *Ibid.*, 168.

⁴⁴⁷ *Ibid.*, 15–16.

treachery and betrayal.⁴⁴⁸ Although counterfeiting a seal on a deed may not necessarily be invested with exactly the same political meaning as that of counterfeiting the king's seal, considering the close association between property and political authority during this period it is not difficult to imagine how the perceived criminality underlying the counterfeiting of a seal on a deed exceeded the mere concern for protecting private interests. Nevertheless, both instances share the quality of an act which, in and of itself, usurps the personal authority of another, political or not. As such, Coke's account of both arson and forgery share a common basis in that the criminality of the offence – be it malice or betrayal – are directly manifested by particular acts posited in the offence, eliding any question of whether different circumstances may alter the finding of criminality.

Although the acts of counterfeiting or burning the house of another may for Coke comprise the central case of criminality in both offences, the acts which manifest the purest expression of their criminality, in the works of subsequent authors, and to some extent even in Coke, we can see a slippage emerging between the identification of the act with its criminality. A nascent example of this is transferred malice, where the law implies that there was malice in an act harming the victim even though the malice behind the act was in fact directed towards another. Although Coke ties his account of transferred malice close to the archetypal situation of an identity between the act and personal malice, seemingly demanding that the intended victim's house is burnt as well as the third party's, Hale pushes its reach further, implying malice in the burning even where the intended target's house "escapes by some accident".⁴⁴⁹ Underlying these accounts of transferred malice is an abstraction of an image of criminality from the archetypal case of arson and its extension, to differing degrees, into circumstances where the assumed unity between its different components are not manifest.

The increasing influence of seeing the criminality underlying the offence operating as an image, as opposed to its direct manifestation in particular acts, can be seen also by

⁴⁴⁸ Ibid., 3.

⁴⁴⁹ Hale, *The History of the Pleas of the Crown*, 1:569.

comparing the manner in which Coke and Hale describe failed attempts in arson. According to Coke “it is necessary that there be a burning...the intent only sufficeth not” and also that if one “put fire into any part of a house, and it burneth not, this is no felony, for the words of the indictment be, Incendit & combussit.”⁴⁵⁰ Hale similarly states that that “if A sets fire to the house of B maliciously to burn it, but either by some accident or timely prevention the fire takes not, this is no felony, though it were a malicious attempt...”.⁴⁵¹ Although identical with regards to their view of the state of the law in this area, the language employed indicates two quite different approaches to envisioning the offence and its underlying criminality. Coke’s account determines the boundaries of the offence by deduction from the archetypal instance and nowhere invites consideration of the malice underlying any of the individual components of the failed attempt. Although there is no direct evidence of why Coke used the language he did, we can speculate on the basis of the rest of his account that he was concerned to assert the integrity of malice as a means by which the reach of the criminal law is given firm definition, therefore tying it closely to its traditional definition. Hale on the other hand, although abiding by the limits placed upon the offence by Coke, is willing to label the general conduct envisioned – the setting fire to and the overall attempt - as malicious. In contrast to Coke malice is not restricted to that manifested by the archetypal instance. Instead an image of malicious conduct is abstracted from the archetypal instance and extended to apply to acts which are envisioned to stand in some sort of relation to it, in this instance an attempt by setting fire. In this sense criminality is not so much something manifest in a certain scenario stipulated by the law, but rests in an image that is, by calculation, applied to conduct.

A similar shift is evident in forgery during this period. We have already seen how Coke perceived at the core of the offence the usurpation of another’s personal authority, manifest in the act of counterfeiting. A consequence of this was Coke’s maintenance of the distinction, derived from the Elizabethan statute around which he organises his discussion, between ‘forging’, which is a straight counterfeiting, and ‘false writing’, which were “larger words than to forge” and involved altering words under a seal, a move also mirroring the

⁴⁵⁰ Coke, *The Third Part of the Institutes of the Laws of England*, 66.

⁴⁵¹ Hale, *The History of the Pleas of the Crown*, 1:568–569.

distinction in high treason between the counterfeit and abuse of the great seal. Although this distinction did not limit the reach of the offence as it did in high treason, both being considered punishable under the statute, it does go some way to highlighting the tension in Coke's conception of the offence. On the one hand by affirming the distinction it speaks to the dimension of the offence's criminality whereby the act of counterfeiting is a symbolic offence against another's personal authority, independent of the act's particular consequences. On the other hand, by extending the reach of the offence to 'false writings' it is acknowledged that this symbolic offence does not exhaust its criminality. The extension of forgery to false writings appears to be done by abstracting an image of criminality from the archetypal instance – the counterfeiting of another's seal – and extending it to different types of acts according to a calculation of how close they sit to criminality manifested in the archetypal instance. This calculation appears to rest on a perception of an archetypal instance as grounded in protecting the integrity of the seal, a conclusion affirmed by Coke's insistence that 'false writing' be tied to writings under seal. Criminality is thus extended or not according to whether the act under consideration is the type of conduct that would undermine that integrity, such as the alteration of writing under a deed, or the insertion of new writing.

The abstraction of an image of criminality from the archetypal instance of counterfeiting also modifies the criminality perceived to be manifested by that act. Whereas Coke's account presents it as a symbolic offence to personal authority, similar to the high treason of counterfeiting the great seal, where the underlying criminality transcends any consequences that may be attributed to it, the casting of it as grounded in the protection of the integrity of the seal it necessarily invites a consideration of consequences antithetical to any such symbolic connotations. Criminality entails calculating whether the deed, when put into circulation, can be considered the authentic representation of the person on the seal.

4. Arson and Malicious Mischief

From Hawkins onwards the role of personal malice against the owner in arson becomes less important, with its formal exclusion as a consideration eventually enshrined by the Malicious Injuries to Properties Act 1827.⁴⁵² On the face of it Hawkins' account appears to occupy a space somewhere between Coke's tying malice closely to instances of burning the house of another and Hale's willingness to deploy maliciousness as a description of a type of conduct. On the one hand, when giving a general definition of the offence, Hawkins asserts malice as a central component of the offence. He begins his discussion with a definition of arson as "maliciously and voluntarily burning the House of another..." whilst asserting elsewhere that "if the Fire happened through Negligence or Mischance, it cannot make him, who is the unfortunate Cause of it, guilty of Arson" as the indictment requires the offence be done *Voluntaire ex Malitia fua praecogitata & felonie*.⁴⁵³ However, when discussing the individual components of the offence in more detail, whereas Hale thought it possible to describe intents and acts as 'malicious' even where all the requirements of the offence weren't present, Hawkins reverts to Coke's formalism. He adopts Coke's rather than Hale's account of attempt, omitting any mention of malice, and preferring to talk of "a bare Intention" or "an actual Attempt" as insufficient to constitute the offence.⁴⁵⁴ Along similar lines he states in relation to the burning of one's own house in order to burn another's that no act "which is only a Crime in Respect of the Injury which it does, or may do, to another, be made a Felony by Reason of an Intention thereby to commit a Felony, if such Intention be not executed".⁴⁵⁵

Overall, Hawkins' account of arson appears to be closely tied to Coke's. Malice is restricted to that of the archetypal instance of the burning of another's house, which itself may be reduced to formal definition, but cannot be extended beyond the boundaries

⁴⁵² 7 & 8 Geo IV c 30, 1827, sec. 25.

⁴⁵³ William Hawkins, *A Treatise of the Pleas of the Crown: Or a System of the Principal Matters Relating to That Subject, Digested under Their Proper Heads*, vol. 1 (London: Printed by Eliz. Nutt, 1716), 105–106.

⁴⁵⁴ *Ibid.*, 1:106.

⁴⁵⁵ *Ibid.*

established in the manner Hale sometimes does. However, although his account may on the face of it bear a close allegiance to Coke, and therefore to his locating the core of the offence in the malice manifested in the burning of a house of another, on closer inspection there is a subtle difference. This is perhaps best evidenced by his account of transferred malice. In its description of the situation in which transferred malice applies he seemingly adopts Hale's approach, emphasising the maliciousness of the conduct as well as omitting any requirement that the house which was the target of the malice be burned also. But Hawkins does not specifically rely upon the maliciousness of conduct as a reason for attributing responsibility for the house eventually burned. But nor does he rely upon the same grounds Coke did. Coke relied upon the malice manifest in the act of burning the intended victim's house in order to extend responsibility to the house accidentally burnt, hence the requirement that the intended house actually be burnt. Hawkins however presents the operation of transferred malice in terms of a positive rule, almost as a legal fiction, it being a "Construction as if it had been levelled against him who suffers it."⁴⁵⁶ Whereas Coke rooted the operation of transferred malice upon a direct extension of the archetypal instance of burning the house of another against whom one's malice is personal, hence it being an actual requirement in order to extend responsibility to the burning of a house against whom one had no personal malice, Hawkins relies more directly upon the operation of a positive rule. Whereas in the former the malice manifest in the archetypal instance directs the operation of the rule, in the latter it is the rule that seemingly employs the image of criminality.

Later authors continue the trend of reducing responsibility in arson to positive definition, whilst moving further away from the notion of personal malice that traditionally sat at the core of the offence. Blackstone follows Hawkins in retaining malice in the general definition of arson whilst omitting it from discussion of its particular components, describing arson as a "malicious and wilful burning", as well as asserting that the burning must be malicious and not by negligence or mischance, whilst also being reluctant to label any particular intent or incomplete attempt as malicious. But Blackstone also goes beyond

⁴⁵⁶ Ibid.

Hawkins in moving arson further away from the notion of personal malice manifested in the archetypal instance. The only explicit consideration of a specific intent to burn the house of another is in regards to intent alone not being sufficient to constitute the offence, rather than a positive condition of responsibility. Moreover, in giving situations where one would think the existence or not of personal malice would, according to the traditional understanding, determine whether the offence was committed, Blackstone omits any mention of motive at all; for example, stating that arson “may be committed by wilfully setting fire to one’s own house, provided one’s neighbour’s house is thereby also burnt”, as well as a landlord burning his own house under lease to another.⁴⁵⁷ East continues this trend of conceiving the offence away from personal malice, considering personal malice against the owner as “the only probable motive” in arson rather than a formal requirement.⁴⁵⁸ Russell subsequently leaves no room for doubt, citing the 1827 Act in stating that “malice against the owner of the property is not essential”, and that traditional insistence on it had “obstructed the course of justice” and “screened the perpetrators of very barbarous acts from deserved punishment.”⁴⁵⁹

The above account of the decline of personal malice exhibits two general characteristics. First, the scope of behaviour covered by the offence shifts from being rooted in the inherent, manifest criminality in the archetypal instance, and instead becomes more directly the effect of the operation of formal rules and definitions posited by law. Evidence of this can be seen not only in how the substance of the law transformed during this period – the move from personal malice as manifest in the act of burning the house of another to it being merely a ‘probable motive’ – but also in the lack of any attempt to explicitly link consideration of individual aspects of the offence – such as the bare intent or acts constituting an attempt – to a substantive image of malicious conduct deriving from the archetypal instance. The image of criminality lying at the core of the offence does not so much operate by the authority of a shared perception between law and community, but rather by the positive authority of law itself. The second general characteristic is that a

⁴⁵⁷ Sir William Blackstone, *Commentaries on the Laws of England*, vol. 4 (Oxford: Clarendon Press, 1765), 221.

⁴⁵⁸ Edward Hyde East, *A Treatise of the Pleas of the Crown*, vol. 2 (London: Printed for A. Strahan, 1803), 1046.

⁴⁵⁹ William Oldnall Russell, *A Treatise on Crimes and Indicatable Misdemeanors*, 2nd ed., vol. 2 (London: Joseph Butterworth and Son, 1826), 484.

notion of 'maliciousness' underpinning the offence appears to be retained throughout. Although personal malice was increasingly marginalised as a requirement, this should not lead us to believe that a general sense of maliciousness was no longer important to understanding the offence. As we have seen, from Hawkins all the way up to Russell, the discussion of arson has started with the common law definition of the offence as a 'malicious and wilful burning', and in this regard has been differentiated from that committed by negligence or mischance.

The question that immediately poses itself is what does 'malicious' in this context actually mean? With the decline of personal malice, signifying a transformation in the substance of the offence as well as its underlying connection to the criminality manifest in the archetypal instance, it may on the face of it be difficult to think of it as anything other than an historical anachronism, a decorative remnant of the traditional common law conception of the offence that no longer serves a function. But to do so would be to overlook a key aspect of the development of arson during this period. As will be seen, the role of malice in arson is not merely marginalised as we move through this period, but is transformed. Whereas once malice pertained to root law in the community by expressing shared perception of criminality, during this period it lost its traditional institutional function and became a more specifically legal concept; a means of organising the law, drawing connections and distinctions between offences and calculating their reach in accordance with the manner that individual behaviour was represented within social relations and determined to be 'malicious'.

As a means of organising law the content of malice was elusive. In this sense it shared an important quality with malice as traditionally conceived. Even though an image of malice was manifested by each offence around which the formalities of the common law crystallised, as we have seen above, malice itself escaped general definition. Traditionally malice operated more as an institutional principle, established by the judgment of the jury in collaboration with institutions of law, rather than a concept deployed to try and describe or represent individual behaviour or social relations. As such, although each offence may

manifest a particular image of malice, it was not an integral part of the function of malice as binding law to the community that connections be drawn between these manifestations in order to develop a general concept of malice. Malice in the modern sense is equally elusive, although for quite different reasons, as will become clear later on.

Malicious Mischief

If generality was antithetical, or at least inessential, to the traditional sense of malice, in its modern function of organising the law it becomes its core. The key to understanding the transformation of malice in arson is to identify how it was deployed in order to draw links with other offences and place it under more general categories. It was Blackstone that made the first significant move in this direction. Although he placed arson, along with burglary, in the chapter “Offences against the Habitations of Individuals”, reflecting the bond between person and property that lay at the heart of the traditional common law mind, in discussing ‘malicious mischief’, itself considered in the chapter “Offences against Private Property”, he immediately makes a link with arson. He asserts that malicious mischief “bears a near relation to the crime of arson” in the maliciousness of the act, distinguished only by the type of property affected, which he defines as: “such as is done, not *animo furandi*, or with an intent of gaining by another’s loss; which is some, though a weak, excuse: but either out of a spirit of wanton cruelty, or black and diabolical revenge.”⁴⁶⁰

Whilst identifying arson with revenge and differentiating it from *animo furandi* may not in itself have added anything to the understanding of malice in arson, its association with a ‘spirit of wanton cruelty’ is significant. Rather than merely being a moment of poetic indulgence on Blackstone’s behalf, the manner in which later authors pick up on this imagery suggests otherwise. East begins his discussion of arson by explicitly following

⁴⁶⁰ Blackstone, *Commentaries on the Laws of England*, 4:244.

Blackstone in stating that the offence can be “properly classed under the general description of *malicious mischief*”, and at the start of the following chapter concerning malicious mischief in general citing arson as “the most prominent [offence] of the class.”⁴⁶¹ Whilst following Blackstone in differentiating malice from *lucri causa*,⁴⁶² he expands upon the image of the ‘spirit’ which it is meant to invoke:

“...it often happens that a violent, lawless, and destructive spirit, however, generally attributable to personal malignity and revenge, is often incited by and accompanied with a lust for plunder, regardless of the means, and hardened against the consequences. Some of the offences which remain to be described are of this sort, originating from a mixture of malice and fraud; where the end contemplation is some undue gain, to be obtained by some violent and destructive means.”⁴⁶³

The most notable feature of this passage is the implication of malice and motive as distinct considerations in relation to the criminality and definition of the offence. Malice becomes a characteristic or quality which, however much ‘attributable’ to a particular motive, signifies something more. It may seem to rest closer to the effects of acting upon such a motive, its being achieved by “some violent and destructive means”, but nor does this fully capture it. At the core of the sense of malice conveyed here is an image of recalcitrance. As one who behaves “regardless of the means, and hardened against the consequences”, the malicious actor is one who escapes the standard norms or expectations of human behaviour, who does not consider the means or consequences of behaviour as others seemingly would. Although maliciousness may spring from motives of revenge or lust, and may be signalled by violent and destructive effects, it is not reducible to either part or the sum of them. It is an attempt to illustrate the recalcitrance evidenced by the individual’s conduct, of which motive or effect may be factors in the calculation.

Whilst these general definitions give a good illustration of the image of the recalcitrant spirit that sits at the core of malice and which animates the law, by themselves

⁴⁶¹ East, *Pleas of the Crown*, 2:1015, 1045.

⁴⁶² Ibid., 2:1014.

⁴⁶³ Ibid., 2:1046.

they give little guide to how malice operates specifically as a legal principle. In order to better understand malice in this sense we need to broaden our perspective and look directly at the more general category of malicious mischief or malicious injuries to property introduced by Blackstone which, as we have seen, arson came to be considered an instance of. The most valuable account of malicious mischief for such purposes is provided by East. Reviewing the law at the dawn of the nineteenth century, his work sits at an important juncture in the development of this branch of criminal law and criminal law in general. On the one hand it was the end of a period where the laws protecting private property were extended through a flurry of legislative activity by means of numerous piecemeal statutory enactments to incorporate an increasing number of diverse types of property. On the other hand it was during a period where increasing interest was being taken in the project of rationalising the criminal law and its system of punishment, immediately preceding a period of concerted legislative campaigns to put these designs into practice, taking the form of Lord Ellenborough's Act 1803, the Malicious Injuries to Property Act 1827, and achieving a good degree of consolidation in the Malicious Damages Act 1861.⁴⁶⁴

A valuable insight into how malice operated in the modern law is provided by the manner in which he employed it in his account of malicious mischief in order to present the myriad of preceding decisions and enactments as coherent. In his overview of malicious mischief there are two occasions in particular where malice is deployed in order to resolve an apparent inconsistency. The first concerns provisions surrounding the injury or destruction of timber and other types of wood, where "some confusion has arisen for want of a more connected and general view of the subject."⁴⁶⁵ One particular confusion which East refers to is an apparent inconsistency between punishment provided by the Black Act and that of later acts.⁴⁶⁶ He expresses surprise that the later acts omit any mention of the Black Act even though "the wording approximates so nearly to the Black Act, and though the offences created by the latter statutes are so much less penal than those named in the

⁴⁶⁴ 43 Geo III c 53, 1803; 7 & 8 Geo IV c 30; 24 & 25 Vict c 97, 1861.

⁴⁶⁵ East, *Pleas of the Crown*, 2:1052.

⁴⁶⁶ 9 Geo I c 22; 6 Geo III c 36, 1766; 6 Geo III c 48, 1766.

other.”⁴⁶⁷ East eventually rationalises the different levels of punishment according to the motive with which the act was committed, the harsher punishment in the Black Act being reserved for cases where there was malice personal against the owner of the property, and the latter statutes covering acts done “malo animo from an unjust desire of gain, or a careless indifference of mischief.”⁴⁶⁸ But the route taken in reaching this conclusion is interesting.

On the face of it, a solution is laid out for East without reverting to any interpretive tricks. As East picks up on himself, the offence as enacted in the Black Act incorporates as part of its description that the act be done ‘wilfully and maliciously’, whereas the latter statutes do not. East could simply have insisted that given that maliciously is only incorporated into the offence with the harsher punishment, that it in turn requires a morally depraved motive which the later acts do not. However, this is not the approach East takes. Rather, he construes the later statutes to incorporate ‘maliciously’ as part of their definitions of the offence, insisting that this is justified by their inclusion in the statutes’ preamble. An important aspect of the reason for taking this approach appears to be to avoid fixing ‘malicious’ with any particular content that would then be applicable across the whole category of offences. If East had not read ‘malicious’ into the description of the offences in the later statute with the lesser punishment, by identifying the offence in the Black Act with personal malice, and doing so on the basis that it was the only offence that made ‘malicious’ an explicit requirement of the offence, the meaning of malicious risked being reduced to personal malice against the owner. Moreover, it would risk connecting the punishment of death provided for by the Black Act with malicious acts understood as motivated by personal malice towards the owner. By reading ‘malicious’ into the description of the offences in the later statutes, and associating it with an “unjust desire of gain” or a “careless indifference of mischief”, he avoids fixing it with any particular motive, such as personal malice.

⁴⁶⁷ East, *Pleas of the Crown*, 2:1061.

⁴⁶⁸ Ibid., 2:1062.

The importance of avoiding reducing malice to a particular state of mind is evidenced elsewhere in East's discussion of malicious mischief. The opportunity for gaining an insight into the reason behind this strategy arises in East's discussion of the burning and drowning of mines where there was, according to East, again "an incongruous and unprecedented disparity in the punishments..."⁴⁶⁹ Whereas the statute concerning the burning of mines attached a punishment of death to the offence, a later statute made their drowning punishable only by a fine equivalent to treble damages and full costs of suit.⁴⁷⁰ Both statutes made 'wilfully and maliciously' part of the description of the offence, and whilst the statute concerning the burning of mines gave no indication as to a specific motive behind the act, that concerning the drowning of mines invoked the image of an act done *lucris causa* "intending thereby to enhance the price of coals and gain the monopoly thereof."⁴⁷¹ If malice were considered to be reducible to particular motives, it would make motive the only means of differentiating the malice in the two offences, and subsequently the basis upon which the disparity in punishments is justified. Given that malice in the case of the drowning of mines would, by virtue of the preamble of the relevant statute, be fixed to a motive of *lucris causa*, it would be presumed that the malice in the burning of mines must be some other motive, most likely personal malice towards the owner given that the statute explicitly proposes the new offence be part of the regime of offences enacted by the Black Act.⁴⁷²

East disregards motive as a basis for understanding the disparity between the punishments attached to the offences. As he acknowledges himself, the result would seemingly be absurd, as the burning of a mine, if done *lucris causa* rather than by malice to the person, "would not fall within the spirit of the first law" even though "there is nothing in words to warrant any such distinction".⁴⁷³ Instead he asserts the distinction to lie in "the

⁴⁶⁹ Ibid., 2:1083.

⁴⁷⁰ 10 Geo II c 32, sec. 6; 13 Geo II c 21, 1739.

⁴⁷¹ 13 Geo II c 21.

⁴⁷² 10 Geo II c 32, sec. 6.

⁴⁷³ East, *Pleas of the Crown*, 2:1084.

means used being in its nature more destructive, and the damage more extensive and irreparable in the one case of firing than in the other of drowning a mine.”⁴⁷⁴

It may seem on the face of it that malice did not play a particularly active role in reconciling these disparities. Although it was essential that the meaning of malicious was not fixed to a particular state of mind, as this would have constrained attempts to rationalise other offences and their punishments, consequentially it is seemingly divested of any content at all. It may be argued that malice was merely an inconvenient remnant of the traditional law which needed to be analysed out of the picture. But this would overlook the key role played by malice in the organisation of this area of law, as evidenced by East’s desire to read malice into the description of offences. If the notion of malicious conduct was omitted from East’s account, it would without doubt still be possible to reconcile the disparities outlined. Any number of retributivist or utilitarian moral principles could have been invoked in order to reach the same conclusion – for example, that greater harms or crueller motives be dealt with accordingly by greater punishments. But by assuming that this would have given us the same result as East reached would be to overlook an important aspect of what he was attempting to achieve, and the futility of relying upon a moral argument. The moral solution essentially reduces the problem to that of the situations in which it is morally justified for the state to use force against the individual. Although connections and distinctions may be made between offences in order to illuminate the moral grounds for punishment, and the conclusions reached should be consistent with all others, this comparative, systematising aspect is not an essential part of the task. Rather, the focus is upon whether the individual, in the particular scenario imagined, gets what he or she morally deserves. Such an approach overlooks the specifically legal nature of the problem of the initial disparity between punishments, nor does it give legal solutions. The law may influence the calculation of the just relationship between individual and state – by, for example, setting a level of reasonable expectations, or identifying social goods – but this is merely the law being deployed as an instrument to resolve a moral problem, rather than being a legal solution in itself.

⁴⁷⁴ Ibid., 2:1083.

However, by placing the notion of malicious conduct at the core of his discussion, East presents both the problem of disparity of punishments and its solution as questions of legal, as opposed to moral or political, order. By generalising the requirement that conduct be 'malicious' across the offences, and avoiding reducing it to any overarching positive definition, the manner in which the problem was presented, and the nature of the solutions given, inescapably involved making connections and distinctions between offences as the meaning of 'malicious' would need to be determined in such a light. For example, if both the malicious burning and drowning of mines are punished with a different level of severity, or acts concerning the malicious destruction of timber have attached different punishments, the inclusion of 'maliciously' establishes at some general level a shared quality with other 'malicious' offences that demands comparison, whilst simultaneously demanding that what it is that differentiates this malice from other offences so as to demand a lesser or greater punishment is also identified. Whereas the moral solution outlined above reduced the problem to an individual instance in which right and wrong must be identified, this approach is inescapably comparative and invoked the notion of a system, with its success or failure inherently depending upon consistency with other offences and coherence across the whole. As such East presented the problem and solution as a matter of order, and, more specifically, as the problems and solutions are defined within the law, legal order.

Although this tells us how malice operated to make the definition of offences a question of legal order, it still fails to tell us much about the substance of malice itself. Being both general and particular, in the sense that it was used to make both connections and distinctions across offences as discussed above, it is immediately clear that it cannot be reduced to any fixed definition. On the contrary, the question of malice had different substantive implications depending upon the offence, and the links made between that offence and others. Malice was not a self-contained concept, but was inherently responsive to the particular context in which it was invoked. As such, if we are to discover what lies at the heart of malice in this more modern, specifically legal sense we need to consider what exactly it is responding too. A good insight into this aspect of malice is gained by returning

to East's discussion of the disparity of punishments in respect to the destruction of timber. After asserting that 'maliciously' is part of the description of the offences in both statutes, he comments on the acts generally that "the most important distinction of all is...the view and intent of the Black Act contrasted with the other statutes."⁴⁷⁵ He then explicitly draws a link between malice and the general intent of the act, stating in relation to the later statutes that "the whole scope of those statutes, which were intended for the protection of the property itself from depredation, shows that the word maliciously is only to be taken in its most general signification, as denoting an unlawful and bad act, an act done *malo animo* from an unjust desire of gain, or a careless indifference of mischief."⁴⁷⁶ Although there is no corresponding speculation as to the intent of the Black Act in the section under consideration, his conclusion that "the malice must be personal against the owner of the property"⁴⁷⁷ is consistent with the view of the act's intent presented in relation to the offence against the breaking of mounds of fishponds that it was "made with a view to protect the owner of this species of property from the malicious resentment of others, who were disposed not so much to benefit themselves by stealing the property, as to injure him by the destruction of it."⁴⁷⁸

Malice on this account thus sits at the juncture between the imagined purpose or policy of law and the positive requirements as to responsibility for particular offences. It is the point through which the "protection of property itself from depredation" is translated into "an unjust desire of gain, or a careless indifference of mischief", and differentiated from "protect[ing] the owner of this species of property from the malicious resentment of others", the point through which the burning of mines is removed from any specific motive, and differentiated from the drowning of mines on the basis of its inherent destructiveness. It is the point at which the rules and decisions of law become more than mere lifeless abstractions or positive acts, but instead become invested with life via the vision of a pattern of social relations, and become part of a system representing and intervening in its

⁴⁷⁵ Ibid., 2:1062.

⁴⁷⁶ Ibid.

⁴⁷⁷ Ibid.

⁴⁷⁸ Ibid., 2:1065.

environment. In essence, malice becomes the point where legal order and social order meet.

But this still does not fully capture the modern sense of malice, nor the transformation it underwent from Coke onwards. To some extent the basic function of malice illustrated so far is largely compatible with that presented by Coke, even if it is more consciously part of a system of legal order. Malice in both its traditional and modern sense acted as a bridge between law and community. In Coke's account of arson we saw how malice grounded the formalities of the law in the judgement of the community as expressed through the jury. The common law's definitions crystallised around a description of those acts presumed to manifest malice to the jury. In arson this was illustrated by Coke as the hostile act of an enemy seeking revenge, a force capable of tearing apart a community bound together by strong personal ties and which both deserved and demanded punishment. Malice in its modern sense developed by East was equally rooted in the community. In giving a positive definition in particular offences to the recalcitrant spirit it targeted, it drew upon a vision of society presented in the imagined intent of the law. This commonality between the traditional and modern sense of malice is perhaps best evidenced by their shared irreducibility to general, positive definition. Whilst malice in its traditional sense was established in the judgment of the jury as to whether the evidence before them manifested it and thus transcended definition, in its modern sense its systematic function in generalising across offences and differentiating between them meant it escaped fixed content. At the heart of both the dynamics in operation here is a relation constitutive of malice between its role in law and the community beyond it.

The Black Act

To further illuminate the transformation undergone by malice it is useful to highlight a particular instance where the traditional and the modern clash. Such an opportunity is provided by East's account of the Black Act. The Black Act makes an interesting case study

as the relation between community and legal institutions assumed and how it deployed criminal law to protect a particular vision of social order embodies a tension between the traditional and the modern. Moreover, its being read through the eyes of East who, as we said before, was writing during a period when the intellectual forces behind criminal law reform were reaching their peak, and just prior to their realisation through legislation, gives further insight into this tension.

As we have already seen East identifies the intent of the Black Act with protecting the owner of property from the malicious resentment of others who sought to injure him or her by its destruction, and upon this basis makes personal malice against the owner a requirement of offences enacted by it. We can see this not only with regards to the destruction of timber, but in relation also to the breaking down the mounds of fish ponds,⁴⁷⁹ and the maiming of cattle.⁴⁸⁰ However, the association between the intent of the Black Act and personal malice which East presents is not as natural as his account may on the face of it suggest. Again returning to the burning of mines, East states that the enacting statute explicitly refers to the Black Act “with which it was meant to be incorporated” and thus is meant to be “governed by the same considerations” as offences enacted by it. This would seemingly suggest that one should only be punished for the burning of mines if it was done out of personal malice towards the owner. However, as we have already seen, East in fact reached the opposite conclusion, arguing that responsibility should not be made dependent upon motive – whether it be personal malice, *lucris causa* or otherwise – even labelling as absurd someone escaping conviction on account of committing the act *lucris causa*.

Another example that the association East makes between the intent of the Black Act and personal malice is not as strong as is first apparent is to be found in his account of the maiming of cattle. This offence occasionally caused problems for the courts insofar as the maiming in many instances was attributable to malice towards the animal rather than the owner, but East begins his account by stating that it is “clearly settled” that in order to

⁴⁷⁹ Ibid., 2:1065–1068.

⁴⁸⁰ Ibid., 2:1070–1077.

come within the offence the malice must be directed to the owner.⁴⁸¹ However, midway through the section East makes an rare foray into commenting upon the required evidence to convict under the offence. Commenting that in those cases where the prisoner was acquitted by reason of the above principle if there was evidence appearing “on the face of the transaction itself” to impute the motive against the animal rather than the owner, he then goes on to state that “it does not appear to have been decided that it is necessary to give express evidence of previous malice towards the owner...but the fact being proved to be done wilfully, which can only proceed from a brutal or malignant mind, it seems a question solely for the consideration of the jury to attribute the real motive to it: to which the transaction itself will most probably furnish a clue.”⁴⁸²

Both these examples would seemingly indicate that there is a tension in the association made by East between the intent of the Black Act and personal malice. This association is made on the presumption that the purpose of the Black Act in protecting the owner of property from the malicious resentment of others is best served by making personal malice against the owner a condition of responsibility. The source of the tension in this association can best be uncovered by looking more closely at the policy which East presumes the Black Act was intended to further. In particular, it can be seen that this policy can be portrayed in two different lights. On the one hand, injury to property is the *means* by which malicious resentment against the owner is exercised. In the other the injury to property *itself* embodies malicious resentment towards the owner. Underlying each of these is a different perception of the owner of property who is to be protected from malicious acts. Whereas the first suggests a notional distinction between the person of the owner and his or her property, the second suggests that the person of the owner is inimically bound up with his or her property. By drawing this distinction we can begin to understand the inconsistencies in East’s account of the Black Act that we have outlined above. Where emphasis is laid upon a requirement of personal malice it would seem to be informed by a perception of the person of the owner and his or her property as distinct, and thus to come within the offence it must be shown that the injury to property was motivated

⁴⁸¹ Ibid., 2:1072.

⁴⁸² Ibid., 2:1074.

by malice towards the person of the owner. Where personal malice plays a lesser role, as in the burning or drowning of mines or in East's comments upon the maiming of cattle, it would seem to be informed by a perception of the person of the owner as inimically bound up with his or her property, and thus to come within the offence it was not necessary to prove further that it was motivated by personal malice.

Although this may help explain the contradictions evident in East's presentation of the Black Act, it begs the question as to why East clearly associated the intent of the Act primarily with personal malice in the first place if its intent could - and by East himself actually was - be associated with a maliciousness that did not rely upon personal malice or any specific motive at all. The answer lies in the fact that the association East makes between the intent of the Black Act and personal malice is not only informed by his own speculation, but also by the manner in which the act was interpreted in the courts. The practice of the courts demonstrated a tendency to identify malice quite firmly with personal malice against the owner, with little awareness of how this may frustrate the policy of the law on general application. Decided in 1800, Ross's Case, cited by East himself, is a leading example of this, and notable also for being a relatively late decision, demonstrating how entrenched this perspective was in the courts. In directing the jury, the judge indicated that the prisoner should be acquitted for breaking the mound of a fish pond as he had committed the act in order to steal the fish, whereas the Black Act "was meant to apply only to cases of malicious mischief, and where the breaking of the mound was the immediate cause of the loss and destruction of the fish, and not merely auxiliary to the destruction of them by other means".⁴⁸³ What is significant in this direction is the identification the judge makes between a particular motive - personal malice against the owner - and malicious mischief as a general category of conduct. The court's attempt to equate malicious mischief with personal malice stands in stark contrast to how the category was actually developed by common law authors from Blackstone onwards. As outlined above, to these authors, including East, malicious mischief was, at its core, embodied by a spirit of recalcitrance, an

⁴⁸³ Ibid., 2:1067; William Oldnall Russell and Edward Ryan, eds., *Crown Cases Reserved for Consideration and Decided by The Twelve Judges of England from the Year 1799 to the Year 1824* (Philadelphia: T. & J. W. Johnson Law Booksellers, 1839), 11.

acting regardless of the means or the consequences. Rather than being reducible to a particular motive, it necessarily exceeded it. To reduce malicious mischief to a particular motive would be to give it a concrete identity that sat in tension with the elusiveness in the attempts at general definition given by Blackstone and East, as well as its function in generalising and distinguishing between offences under the category of malicious mischief.

An insight into why the courts would maybe reduce malicious mischief into personal malice, and why East would adopt it also, is present in his account of offences against the maiming of cattle. We have already seen how after asserting that the malice must be against the owner rather than the animal East comments that it is uncertain whether express evidence of previous malice against the owner needs to be given.⁴⁸⁴ What is interesting about East's argument is that, although it is reasonably clear that he is seeking to weaken the requirement of personal malice in this area, he does not make an argument in law that personal malice is not required by the offence. Instead he turns his attention to the evidence necessary to convict the prisoner under the offence to argue that "the fact being proved to be done wilfully, which can only proceed from a brutal or malignant mind, it seems a question solely for the consideration of the jury to attribute the real motive to it".⁴⁸⁵ On the face of it this may seem like East is suggesting that a legal presumption of malice operates where there is a wilful act, arguing for a particular legal construction of the facts. However, East is drawing upon a much older tradition of finding malice in the courts. Given the passage arises in the context of suggesting that evidence of previous personal malice need not be given to bring a prisoner within the offence, East's argument seems to be that the wilful act itself *manifests* directly to the jury personal malice towards the owner, rather than that the law presumes it be done with such a motive. Much like the burning of another's house manifests malice towards the owner, so too does the maiming of cattle.

The continuing influence of the manifest model of criminality both in the courts and in East's work gives a good indication as to why the intent of the Black Act in both was so

⁴⁸⁴ East, *Pleas of the Crown*, 2:1074.

⁴⁸⁵ Ibid.

closely tied to personal malice. Given that manifest criminality relied upon the jury directly perceiving in the facts before them that malice which posed a threat to the community, the strength of the identity between the person and property in the community meant that a malicious act against property which deserved and demanded punishment, when reduced to definition, would be articulated as an act motivated by personal malice. The strength of this identity between person and property, both in the community and in the traditional common law mind, subtly transforms that tension we identified before in East's interpretation of the intent of the Black Act as protecting the owner of property from the malicious resentment of others. As we saw, to the modern mind it poses a question as to whether destruction of property is the means of executing a malicious act against the person of the owner, or is in itself a malicious act against the person as property owner. But where there is a strong identity between person and property, and where criminality is manifest upon the facts, this distinction is dissolved. An act against property is neither a means of malicious resentment against the person of the owner, nor is the person of the owner transformed into an abstract category of property owner defined by their property owning. The bond between person and property transcended such distinctions, and as such personal malice was a natural way of translating the intent of the Black Act in particular offences.

Against this background we can see how malice in its traditional and modern sense clash both within the very intent of the Black Act and in East's account of it. On the one hand it drew upon a traditional sense of malice as that which was directly perceived by the jury to be a threat to the community. Based upon the practice of the courts where the bond between person and property would have been strong in the minds of both judges and jury, the intent of the Black Act in protecting the owners of property from malicious resentment was articulated as personal malice against the owner of the property. Personal malice embodied both the act against property as an act against the person of the owner, and the threat the presence of such a force posed to the life of the community. As such, 'personal malice' as a motive was indistinguishable from 'malicious' in a more general sense signifying criminality as imagined by the community and enforced by the courts.

On the other hand it also drew upon the more modern sense of malice as conduct which was targeted by a purpose or policy behind the law. As we saw, the intent of the Black Act was, in East's eyes, to protect the owner of property from the malicious resentment of others. But the owner of property envisioned here is not every specific owner or any owner in particular, but rather its aim is general. It aims to protect the owner of property as an abstract category against a type of conduct which threatens it. In other words, it is maintaining those relations through which the property owner exists and determining as 'malicious' that which disrupts them. In this context personal malice as a form of responsibility has a very different function. Whilst it may still play an important role in attributing responsibility in law, it does so as part of a general calculation as to what conduct is a 'malicious' threat or disruption to an imagined relation. This transforms the relationship between personal malice and malice in the general sense as the core of criminality. Personal malice in the traditional model was indistinguishable from malice itself, manifested by acts against property where the bond between person and property was strong, and was thus at the core of criminality. In the modern framework personal malice stands in a different position in relation to malice as criminality. It becomes a specifically legal technique for distributing responsibility according to a calculation as to what is 'malicious' conduct according to an imagined general pattern of social relations to be secured by law. As such it does not at its core embody criminality, but is instead an effect of its calculation elsewhere. Whereas personal malice in the traditional model bound law and community in its recognition by the jury as manifest in the particular act against property, in the modern model it was a general representation of conduct calculated as 'malicious' within a view of the pattern of social relations.

East's account of the Black Act shows evidence of both the traditional and modern understanding of malice. On the one hand the close association he makes between the intent of the Black Act and personal malice clearly seems to be informed by an image of malice that is manifest in the destruction of property where the bond between person and property in the community is strong. This is evident not only where East quite explicitly

makes the association – as in the destruction of timber and the destruction of the mounds of fish ponds – but also in his apparent desire to retain it as the central image of criminality even where there is room for its weakening – as in his comments on the evidence necessary to bring a conviction for the maiming of cattle. However, a more modern understanding of malice is evident in his discussion of the burning and drowning of mines, where he explicitly refused to make the finding of malice dependant on a particular motive, whether it be personal malice against the owner or *lucri causa*. Instead of identifying ‘maliciously’ in the offence with personal malice against the owner, the calculation of malicious in light of the intent of Black Act leads East to place greater emphasis on the inherent destructiveness of the act, not stipulating any particular motive at all. Moreover, when incorporating the Black Act into the general category of malicious mischief, despite his uncritical citation of Ross’s Case where malicious mischief is reduced to personal malice, East demonstrates obvious awareness that the manifest image of personal malice in acts against property is not sufficient to protect property ownership as a general relation. This is particularly evident where he distinguishes the Black Act from later statutes regarding offences against the destruction of timber, where the latter is considered to protect ‘property itself’, and interprets the meaning of ‘malicious’ in the offence as “careless indifference” or “unjust desire of mischief”. When malicious is deployed by East in this modern sense, personal malice moves close to it being a ‘motive’ in the contemporary sense as a possible representation or evidence of criminality, rather than being manifestly malicious or criminal in itself.

5. Forgery

Similar to what we have seen regarding arson and malicious mischief, the overarching trend in forgery during this period is a move from criminality as manifested by particular acts to criminality as being established by a more general inquiry into the conduct of the accused. In forgery in particular it takes the form of a shift from forgery as a symbolic offence against the personal authority of another towards the establishing of a fraudulent

or deceitful intent. A general overview of how the role of intent in the main authors' accounts changed gives some indication of this. In both Coke and Hale, where forgery was largely bound up with notions of a symbolic offence to the personal authority of another, any inquiry into intent is largely subordinate to the act undermining the integrity of the seal which manifested the offence's criminality. For example, Coke's discussion of intent is in reality an inquiry of the types of sealed instruments that may be the subject of forgery under the Elizabethan statute for "it is not expressed by this act, what estate, or interest should be mentioned to pass by the deed, charter, &c. whereby the estate of the freehold or inheritance should or might be molested, &c. or charged".⁴⁸⁶

By the time we reach East and Russell intent has become a much more prominent component of the offence. The first section in East's chapter on forgery is entitled "With what intent the act must be done."⁴⁸⁷ Although this section comprises only a paragraph, it highlights clearly how the focus of the offence had shifted. He states that a "deceitful and fraudulent intent appears...to be of the essence of [forgery]" before claiming, somewhat inconsistently with Coke's account, that this was particularly expressed in the Elizabethan statute.⁴⁸⁸ The significance of the move is that whereas previous authors had buried any discussion of intent within the other requirements – such as the type of instruments or acts which come within the offence – East is willing to discuss it as an independent requirement of the offence. Russell similarly incorporates a section on the intent of the prisoner where he asserts that "the fraud and intention to deceive constitute the chief ingredients of this offence".⁴⁸⁹

However, there are subtle differences between East and Russell's accounts. First is the location of the section in relation to the chapter as a whole. Rather than at the very beginning, Russell places it at the end of the substantive discussion of forgery, after consideration of the making or altering necessary to constitute forgery and of what types of

⁴⁸⁶ Coke, *The Third Part of the Institutes of the Laws of England*, 169; 5 Eliz c 14, 1562.

⁴⁸⁷ Coke, *The Third Part of the Institutes of the Laws of England*, 854.

⁴⁸⁸ Ibid.

⁴⁸⁹ Russell, *A Treatise on Crimes and Indicatable Misdemeanors*, 2:353.

instruments in respect of which forgery may be committed. The second difference touches upon the substance of the section which, although still relatively small in comparison to the other sections, includes important additions. First, emphasis is placed on how there need not be a specific intent to defraud any particular person, but that a general intent to defraud is sufficient to come within the offence. Second, he incorporates Hawkins' principle that forgery consists in "the endeavouring to give an appearance of truth to a mere deceit and falsity" as part of the inquiry into intent. This stands in contrast to East who presents Hawkins' principle as a critique of Coke's distinction between forgery and false writing. The third difference concerns common examples invoked by authors to illustrate the principles of common law, one being the alteration of one's own instrument which may only prejudice himself, the second being the writing of a will for another without their direction. Whereas East only sees the first falling within the concern of this section, Russell incorporates both of them.

Hawkins makes two important developments from Coke and Hale. The first concerns the distinction Coke drew, and which Hale did not explicitly comment upon, between forgery and false writing. Hawkins states that he sees no good reason for this distinction as between the two "the Fraud and Villainy are the very same",⁴⁹⁰ before going on to state that forgery in general consists in "the endeavouring to give an Appearance of Truth to a mere Deceit and Falsity, and either to impose that upon the World as the solemn Act of another, which he is no way privy to, or at least to make a Man's own Act appear, to have been done at a Time when it was not done, and by Force of such a Falsity to give it an Operation, which in Truth and Justice it ought not to have...".⁴⁹¹ By breaking down the distinction made by Coke between forgery and false writing, Hawkins moves the focus in forgery away from particular acts which manifest an offence against the authority of another and makes the effects of those acts which make up the prisoner's 'endeavouring' more explicitly a part of the inquiry – the manner in which they 'give an Appearance of Truth', 'impose upon the World' and 'give it an Operation'. Along the same lines a forgery of any 'Writings of an inferior Nature' is only brought within the offence if someone 'receive

⁴⁹⁰ Hawkins, *Pleas of the Crown*, 1:183.

⁴⁹¹ Ibid.

a Prejudice from it'. On the face of it these passages suggest that the criminality of forgery is no longer manifest in particular acts themselves insofar as they are an offence against the authority of another, but instead consists in the effect it has or is intended to have upon others.

However Hawkins narrowly construes what a relevant effect is. Although Hawkins does not explicitly reduce effects to legal consequences, the manner in which his discussion of forgery is based almost entirely upon legal instruments makes it inevitable. As the nature of a legal instrument is that it in itself embodies the legal rights of the parties, a forgery always aims at presenting the rights of the relevant parties as different to what they actually are or should be in law. This is evidenced throughout Hawkins' account by identifying prejudice incurred with the manner in which the forgery did or sought to alter legal rights. As such, when Hawkins speaks of forgery as being located in the effect of conduct - its 'Appearance' and 'Operation', and the 'World' in which this effect is realised - he reduces this effect to a matter of legal operation. Forgery targets that conduct which, by the misuse of legal instruments, seeks to alter subjects' legal rights.

The collapsing of effect into legal consequences had two implications for attempts to develop a general and principled account of the offence and its reach. First, the type of conduct that would come within the offence was closely bound to the nature of those particular acts necessary to secure a successful forgery of a legal instrument. Where the prisoner seeks to defraud the court or subjects within a community there is a strong tie between person and property, and ownership of estates is widely known, the only forged instruments likely to succeed were those which approximated the pre-existing true state of things in law. Forging an instrument in the name of one who does not actually exist or for an estate that does not exist would be of little benefit to the prisoner. Instead the finding of forgery most frequently turned on whether the prisoner had the authority to make, alter or insert in the name of another, or even in their own name in the case of ante-dating a deed. As a consequence when attempting to conceptualise the offence in general terms it was frequently informed by the image of an act against personal authority, either in the

particular circumstance of one acting in the name of another without authority, or in more general terms as an act against the integrity of an instrument through which one can exercise their personal authority in law, as in the case of ante-dating a deed.

The second implication for attempts to develop a general and principled account is the pervasive association between forgery and the infliction of a prejudice upon another. If one takes the forgery of legal instruments within a community where the bond between person and property is strong as a basis from which to develop a general account of the offence, it is easy to see why infliction of prejudice was initially considered a core component of the offence. Following on from the first point, in particular instances of forgery any attempt likely to be successful must be one which presents a particular person's legal rights as being different from that which they actually are or should be. However, forgery in the context of legal instruments is inescapably bound to prejudice in a more general sense. A legal instrument such as a deed, assuming it to have been drawn according to the required formalities, presumes its own effective operation and thus its impact upon others' rights. Whereas a private instrument's impact may still be conditional upon other factors - in the case of offering a promissory note as credit for goods, for example, the transfer of rights over those goods is conditional upon the decision made by the party to accept it as credit or not - a legal instrument embodies of itself the rights affecting the persons and property identified. In the case of a forged legal instrument presenting the rights of subjects as different from what they actually are or should be according to the true operation of law by its very nature involves a prejudice to another. The very act of forging a legal instrument presumes an altered representation of others' rights, not conditional upon any intervening act or event. As such the infliction of a prejudice was often seen as integral to forgery.

This association between forgery and the infliction of a prejudice is most evident in the other important development made by Hawkins concerning the instruments in respect of which one may be guilty of forgery. Here Hawkins speculates that the reach of the common law extends beyond the 'public' legal instruments traditionally protected and to

‘Writings of an inferior nature’ too. He dismisses the argument that they are outside the protection of the common law because they are private instruments, reciting that deeds are also private instruments, before going on to state that “it may be reasonable to make this Distinction between the counterfeiting of such Writings, the Forgery of whereof hath been already shown to be properly punishable as Forgery, and the counterfeiting of other Writings of an inferior Nature, that the former is in itself criminal, whether any third Person be actually injured thereby, or not, but that the latter is no Crime, unless some one receive a Prejudice from it.”⁴⁹²

Hawkins’ suggested extension of forgery’s reach appears to rely upon a particular notion of prejudice and the alteration of legal rights as lying at the core of the offence, whilst also recognising how public and private instruments operate differently. Even though a third person may not actually be materially prejudiced by it, Hawkins states the forging of a public instrument is ‘in itself’ criminal as a notional prejudice in the altering of another’s legal rights is manifest in the very act of making, inserting or altering a legal instrument. A concrete link can thus be made between the forged instrument and the alteration of another’s legal rights, either at the level of intent, appearance or reality. On the other hand the nature of the transactions involving ‘inferior writings’ means alteration in legal rights is often conditional upon the act of another party. However, the act upon which the transfer is conditional may not necessarily be a direct consequence of the forgery itself. The alleged victim may rely upon any other number of considerations in transferring his or her rights. As such the connection between the forged instrument and the alteration of legal rights is less straightforward. In order to constitute a criminal forgery, the forged instrument needs to be proven to have caused the alteration of legal rights. In all, running through Hawkins’ attempt to give a general picture of the offence is the necessity of a connection between the forged instrument and the altering of legal rights, it being presumed with regards to public instruments and a matter to be proven in regards to inferior writings.

⁴⁹² Ibid., 1:184.

Validity, Prejudice and Intent

Moving on to East's account of forgery, the most obvious contrast with previous authors is the reliance upon fraudulent intent as a basis for bringing certain types of conduct within the offence. Up until East, intent was rarely considered as an independent component of the offence, but was rather perceived to manifest itself in particular acts, or more specifically, in the legal consequences of such acts. For example, the only mention of intent in Coke's account is in relation to the types of interest with regards to which an intent to molest may come under the offence in the Elizabethan statute as "it is not expressed by this act, what estate, or interest should be mentioned to pass by the deed, charter, &c. whereby the estate of the freehold or inheritance should or might be molested, &c. or charged",⁴⁹³ a matter closer to the types of instruments protected by forgery rather than a direct inquiry the defendant's state of mind. Hale appears to make intent a more central component of the offence when, after citing the ante-dating of a deed as forgery, he adds that it is not the bare ante-dating that makes it forgery as this would bring other common legal practices concerning assurances within the offence, but that it is "the intent to avoid his own feofment...so the intent is to be joined in case of forgery."⁴⁹⁴ However, once again intent is not so much presented as an independent basis upon which conduct is brought within the offence. Intent to forge is still seen as manifest in the act of making, altering or inserting with regards to a legal instrument. Hale's addition seems to merely serve to remind that where such an act is allowed for by law it is not to be considered forgery. Hawkins' most direct comment upon intent is in regards to one who alters his own bond so as to vacate his own security, them not being guilty of forgery as "here is no appearance of a fraudulent Design to cheat another, and the Alteration is prejudicial to none but to him who makes it..."⁴⁹⁵ Again intent is only considered in relation to the consequences of his acts for him or herself and third parties. Common across all three authors is that intent is not presented as an independent consideration. Instead it is reduced to the particular legal consequences of certain acts. As such intent is manifest in those acts that have certain legal

⁴⁹³ Coke, *The Third Part of the Institutes of the Laws of England*, 169.

⁴⁹⁴ Hale, *The History of the Pleas of the Crown*, 1:683.

⁴⁹⁵ Hawkins, *Pleas of the Crown*, 1:183.

consequences, rather than a requirement of the offence independent from them that requires to be established on its own grounds. The possibility of intent criminalising conduct beyond the legal consequences of acts is not directly considered.

Intent is at the centre of East's account of forgery. As already alluded to above, he is the first author to include a section on intent specifically, placing it at the very beginning of the chapter. However, just as significant is the manner in which intent is invoked frequently across the chapter in discussion of the offence's other formalities in order to conceptualise its reach across different types of instruments and conduct. In particular it is invoked in order to undermine the two consequences of Hawkins' focus on legal effect we identified above – the deducing of conduct imagined to be forgery around that required to make the instrument valid in law, and the necessity of a notional or actual prejudice inflicted upon another.

With regards to the relation between forgery and validity of instruments, before looking at East it is important first to highlight that it was in fact Hawkins that first attempted to draw a distinction between the two. He stated that it "be no way material, whether a forged Instrument be made in such a Manner, That if it were in Truth such as it is counterfeited for, it would be of no Validity, or not",⁴⁹⁶ citing as an example a forged Protection in the name of someone as a Member of Parliament who in fact at the time was not as being equally an offence as if he were. Although doubtless an important step in dissociating forgery from the matter of validity, without stipulating why the validity or not of a forged instrument is immaterial, and correspondingly indicating where the criminality of forgery does lie, it tells us very little. This is especially so given that from the rest of Hawkins' chapter there is clearly some overlap between conduct which gives rise to valid legal instruments and that which comes within forgery.

⁴⁹⁶ Ibid., 1:184.

If Hawkins' approach begs more questions than it answers, East attempted to put the relation between forgery and what is true and valid in law upon a more principled footing. In particular he relied upon the argument that, even if there was no possibility of the forgery having a valid operation in law for want of certain formalities, where an intent to defraud could be established such making still came within the offence. East organised his chapter so as to bring intent out as being at the core offence. But he seemingly wished to do so without creating the impression that the law had been radically altered by the increase and consolidation of private instruments within English society throughout the eighteenth century. He preferred instead to see such developments as an opportunity to make more explicit the 'true' principles underlying the offence. In doing so he began all the key sections in the chapter concerning the traditional formalities that had informed forgery in the common law mind – the need for validity at law, the act in the name of another – not with cases concerning the newly emerging private instruments that were quite openly posing a challenge to the received law, but those legal instruments which had traditionally been protected at common law and by the Elizabethan statute.

Moreover, these were cases concerning legal instruments where intent to defraud had arisen as a basis for liability independent of the possible operation of the forged instrument in law, primarily because the instruments concerned could not possibly be true in law. For example, three of these cases that East gives prominence to insofar as the court relied upon the intent of the defendant to convict concerned a deed forged in the name of another who did not actually exist, the forging of a last will and testament though the supposed testator was still alive, and the forged conveyance of a land which in fact did not exist. The last case in particular, Crooke's case, vividly illustrates this shift in focus. The report of the final decision in that case stated that "it is not necessary, there should be a charge or a possibility of a charge; it is sufficient that it be done with that intent, and the jury have found that it was done with intent to molest Garbut and his wife in the possession of their lands."⁴⁹⁷ This was most remarkable considering the focus of the initial trial where, in deliberating whether the instrument was a forgery given the discrepancy, the judges

⁴⁹⁷ R v Crooke, 2 Strange 901, 902.

placed great stress upon whether such a conveyance, if true, could have conveyed a right in equity if not in law. Although the judges seemed to agree that the forged instrument may have by operation of equity molested the right of the true owners, in the present case the indictment was not sufficient and could not be made good by a finding of intent as “the intention is not enough within the statute”.⁴⁹⁸ Whereas the initial trial centred upon the legal operation of the forged instrument, the final decision as reported explicitly dismisses the notion that forgery was dependent upon the instrument’s actual or possible operation in law, and introduces the intent to defraud as a means of doing so. Whereas intent in forgery from Coke through to Hawkins was, in the few passages in which it was actually discussed, identified so closely with the instrument’s legal operation so as to make the two inquiries barely distinguishable, East builds his account of the offence around a group of cases where intent is employed specifically to undermine such an association, moving intent to the core of the offence in the process.

The second area where East invokes intent to defraud as a means of undermining the traditional imagining of forgery is with regards to the need for a prejudice. As we have already seen for Hawkins the question of prejudice touches closely upon the issue of the reach of the offence over those ‘inferior writings’ which were becoming an increasingly important aspect of social and economic relations. Although East accounts for the struggle to incorporate these writings within the protection of the common law on the basis that “it was natural enough for the first writers on this subject to adapt the language of their definition to the common experience of the times”, he nevertheless comments that the distinction Hawkins sees in the common law between these types of instruments “stopped short even of the experience of his own and former times”.⁴⁹⁹ East then targets how Hawkins presents this distinction as operating with regards to forgery, attacking the assertion that a prejudice is required in cases of forgery involving inferior writings on two fronts. The first concerns the relationship between forgery and cheats within the general scheme of the law. In East’s definition, cheats at common law “consists in the fraudulent obtaining of the property of another by any deceitful and illegal practice or token (short of

⁴⁹⁸ R v Croke, 94 English Reports 652.

⁴⁹⁹ East, *Pleas of the Crown*, 2:859.

felony) which affects or may affect the public”,⁵⁰⁰ and also enlarged by statute. By asserting forgery of inferior writings and an actual prejudice received, East argued that Hawkins makes a “mere conjecture which leaves the crime of forgery as indistinct in principle as before” and which “tends to confound it with the general class of cheats”.⁵⁰¹ As such, from the perspective of the criminal law as a whole, by rendering forgery of inferior writings and cheats indistinct through the requirement of an actual prejudice, Hawkins has, in East’s eyes, clearly misunderstood the core principles underlying the offence.

The second line of attack adopted by East relies more directly upon an interpretation of the authorities. His analysis of the cases involves an interesting approach to identifying the ‘true’ principles underlying forgery. He questions Hawkins’ interpretation of the authorities on the basis that “it does not appear...that it is anywhere adjudged, or is even generally laid down, that the counterfeiting of writings of any sort, whereby any person may receive a prejudice, if done *lucri causa* or *malo animo*, is not punishable as forgery.”⁵⁰² In reality this would be because the question would rarely have arisen. As we have already seen, where the forged instrument implies its own effect, such as a deed, and a successful forgery required the adoption of the law’s own substantive and formal criteria of validity, both the prejudicial effect and the intent were usually manifest in the very act of forging itself. East however capitalises on this to argue that Hawkins’ assertion that there must be a prejudice in cases involving inferior writings is not supported by authority by reason of the opposite not having been solemnly ruled.

East then relies upon the decision in the early eighteenth century case of Ward as authority for the same proposition, where the forging of an endorsement on the back of a certificate was held to be forgery, the judges explicitly holding that it was despite no prejudice being suffered on the facts.⁵⁰³ Whereas the judges in Ward acknowledged that there was “no judicial authority on either side” and their reasoning gave little indication of

⁵⁰⁰ Ibid., 2:818.

⁵⁰¹ Ibid., 2:860.

⁵⁰² Ibid.

⁵⁰³ R v Ward, 93 English Reports 824 (1725).

the scope of the rule laid, proceeding cautiously “upon the reason of the thing”, East seemingly tries to find foundations for the proposition more directly within the law of forgery itself.⁵⁰⁴ Underlying East’s seemingly negative argument was in fact a more positive attempt at conceptualising the offence. In particular the role of intent in the offence is subtly transformed. As we have seen intent was traditionally considered largely manifest in the effects of the act, in particular the impact upon another’s rights in law. By weakening or making more contingent the relationship between forgery and the following of particular consequences, East not only transforms the nature of intent insofar as it is freed from being reduced to any particular effect, but also makes it a core component of the offence distinctly independent from other considerations upon which conduct may be adjudged forgery or not. Whereas historically intent may have played a relatively passive role in forgery, being manifest in the other acts which constituted the core of the offence, for East it clearly played a central role in extending the law’s reach over the increasing types of instruments and the new forms of social interaction they introduced.

From Credit to Prisoner’s Use Of Instrument

From this overview of East’s account of forgery we can see that there is a clear correspondence between the breakdown of formalities surrounding the offence and the emergence of intent as being at the core of the offence. However this alone does not tell us much about the nature of the transformation undergone by forgery during this period, nor what it signifies. In order to do so we need to develop a clearer impression of what exactly the emerging focus on intent, and the corresponding weakening of other formalities, was responding to. East’s account merely informs us that intent emerged from the process of differentiating forgery from cheats, secured by a rather purposive reading of the authorities. We need also to explore its possible relation to the proliferation of new types of private instruments in English society during this period and how it transformed the role performed by law.

⁵⁰⁴ Ibid.

The first step in doing so is to draw a connection between the employment of intent to challenge the formalities surrounding the validity of instruments on the one hand and prejudice to a victim as described above on the other. The effect of employing intent in both is to detach the finding of criminality from the particular consequences of the act in the immediate case. Although Hawkins may have made the forgery of legal instruments criminal 'in itself' on the basis of the inherent legal operation they present themselves to have, the effect of the decision in Crooke's case upon which East relies clearly suggests that the actual or possible operation of the instrument is subordinate to the prisoner's intent to defraud in finding criminality. The move from requiring an actual prejudice to a possible one similarly abstracts forgery from the particular consequences in the instant case. Rather than relying upon the establishing of a causal link between the act of the prisoner and any prejudice suffered by the victim in the particular case, criminality rests instead upon a direct assessment of the prisoner's conduct in light of a more general calculation as to its impact upon social relations.

A good indication as to why intent emerged as part of the core of the offence against the background of the undermining of other formalities is given by a line of cases concerning the subscribing of notes in fictitious names at the time of the transaction, and East's commentary on them. The decision in Dunn's case in 1765, which East treats as one of the leading cases in the area, provides an interesting sketch of how the assumptions of the traditional law were coming into conflict with more modern objectives. The facts of Dunn's case were that the prisoner had subscribed to a promissory note in a fictitious name upon which money was forwarded. The name used was part of a larger design whereby the prisoner had presented herself as Mary Wallace the wife of a deceased seaman and, by the means of a pretended probate, to be entitled to his unpaid wages. The money advanced by the victim was done so on the credit of the wages he believed to be due to her. Although the jury initially found her guilty, judgment was reserved over the question of whether the

note, though made in an assumed name and character, was her own, made and offered as her own, and not as the note of another in distinction to herself.⁵⁰⁵

The approach of the judges to resolving the issue reflected the concern seen above to link the alleged forgery to the loss incurred by the victim. Their focus in particular was to determine against whom the victim believed him or herself to have a remedy against for the loss. This question in turn was determined by identifying to whom the victim gave credit. Where credit was given to the person of the prisoner themselves without any relation to a third person, even where the prisoner subscribes in a fictitious name, no forgery is committed as “the lender accepts the security as the security of that person only; he has no remedy in view but merely against the man he is dealing with”.⁵⁰⁶ On the other hand, where the instrument is forged in the name of another, either existing or not, and it receives superior credit on that basis, the instrument is properly a forgery for “in that case the party deceived does not advance his money or accept the instrument upon the personal credit of the party producing it, but upon the name and character of the third person, whose situation and circumstances import a superior security for the debt”.⁵⁰⁷ As the victim advances money on the basis of the superior credit granted to the character the prisoner presents him or herself to be, rather than their actual person, “he believed...that he had a remedy upon it against the third person in whose name it was given...but this being false, he has no such remedy, and therefore is materially deceived.”⁵⁰⁸ Upon the facts of the case the judges upheld the guilty verdict as credit was given to the note upon the basis of the character of Mary Wallace assumed by the prisoner, to whom it was falsely believed unpaid wages were due, and it was against such a person that the victim believed he had a remedy.

The most notable aspect of the decision in *Dunn* is the role attributed to the instrument in calculating whether the victim suffered a prejudice or not. Where the court determines that credit is given to the person of the prisoner, they are effectively saying that

⁵⁰⁵ *R v Dunn*, 168 English Reports 131 (1765).

⁵⁰⁶ *Ibid.*

⁵⁰⁷ *Ibid.*

⁵⁰⁸ *Ibid.*

the allegedly forged instrument played no role in the transaction at all. That from the perspective of the victim the instrument itself did not add anything to their decision as to whether to grant the prisoner credit. As such whether the prisoner's conduct comes within the offence is determined with no consideration of the instrument itself, regardless of the prisoner's conduct in relation to it. On the other hand, where the court decides that credit is given to the name and character assumed by the prisoner, real or fictitious, on the face of it the court appears to determine that the instrument subscribed in that name played some role in the decision of the victim, and hence is a cause of the prejudice suffered. From this it is deduced that it is "strictly and properly a false instrument" and thus comes within the offence.⁵⁰⁹ However, it is difficult to see how on this reasoning a distinction can be drawn as to whether an instrument is forged or not. Although the court appears to imply that, based upon the victim's reason for advancing credit, the instrument's position in relation to the loss in each scenario changes, in reality there is no intrinsic difference. In both cases the calculation directly concerns to whom credit was given, and whether by any representation the prisoner secured superior credit. Although the judges infer that the forged instrument plays a greater role where the person or character of another is assumed to whom superior credit is given, the calculation made by the victim is in fact exactly the same. It is the victim's calculation as to the credit of the person, whether it be the person of the prisoner or their assumed character, that induces the victim into a transaction or not. The credit afforded to the instrument is merely derivative of that inducement. As such, to say, as the judges appeared to in *Dunn*, that where there is a prejudice in the understanding of the courts that the instrument somehow acquires a more central role in causing it, and thus deduce that it is a forgery, is misleading. Whether a prejudice occurred in either scenario is based upon the same essential calculation as to the credit to be afforded to the prisoner, with the instrument not necessarily adding anything to it and any character ascribed to it as a consequence being merely contingent.

By imagining forgery from the basis of whether a prejudice was suffered or not it was difficult to identify any core principles or purpose underlying it. Different aspects of the

⁵⁰⁹ Ibid.

offence were subsumed by an inquiry into the particular motivation of the victim in granting credit, even though this inquiry was not at its core one into the prisoner's conduct in relation to the instrument concerned. In distinguishing between where credit is given to the person of the prisoner or the character they assumed, although the instrument in the two scenarios may be identical, as well as the prisoner's conduct in relation to them, not only was the eventual outcome of the case dependent upon the particular whim of the victim, but also whether the prisoner's conduct in relation to the instrument itself is considered at all. In this light the attributing of criminality to the forgery where credit is granted to the assumed character, and not where it is granted to the person of the prisoner, appears, on the face of it, to be arbitrary. No firm reason based upon the notion of prejudice can be found for attributing criminality in the one scenario and not the other which focuses specifically upon the role of the instrument in the transaction, nor the prisoner's conduct in relation to the instrument.

Against this background we can begin to identify what lay behind East's moving fraudulent intent to the core of the offence. Making fraudulent purpose the core of the offence prevented the finding of criminality being contingent on the whim of the victim according to the particular facts before the court. By inquiring directly into the intent of the prisoner the courts were able to judge the conduct of the prisoner specifically in relation to the allegedly forged instrument. A good illustration of this is the manner in which East presents the earlier cases of Taft⁵¹⁰ and Taylor⁵¹¹, which he suggests were decided upon the same principle as Shepherd.⁵¹² In both cases the court relied upon the fraudulent intent of the prisoner in order to bring their endorsing of a bill in a false name within the offence even though it was not necessary to obtaining credit. The court's motivation in both cases behind finding the prisoners guilty appeared to lie primarily in the fact that both had obtained the respective bills by illicit means, and it was in relation to the prejudice of the original owner that the courts were determined to find a fraudulent intent in relation to. However, East's presentation of the cases demonstrates an attempt to not only expand the

⁵¹⁰ R v Taft, 168 English Reports 189 (1777).

⁵¹¹ R v Taylor, 168 English Reports 209 (1779).

⁵¹² R v Sheppard, 168 English Reports 215 (1782).

range of victims and prejudices considered by the law, which was most probably the courts' primary ambition in these particular decisions, but to transform the calculation as to prejudice in forgery in order to focus more directly upon the instrument itself. In particular the calculation is based upon a standard set by what the courts perceive to be the normal and legitimate use of the instrument. When Taft and Taylor are brought together with Shepherd, they are abstracted from their particular context and their impact extended somewhat. The emphasis becomes not so much the identity of the person prejudiced, but the manner in which the prisoner's conduct in relation to the instrument enabled that prejudice to occur. In Taft and Taylor, as well as Shepherd, this was done by the use of a fictitious name, by which means they managed to prevent their being traced in the manner in which they would be according to the normal use of the instrument.

That the move to fraudulent intent corresponded with greater focus upon how the prisoner's conduct in relation to the instrument in particular enabled the prejudice, rather than the prejudice itself, is given greater credit when one recalls that the case of Ward, mentioned above, decided that an actual prejudice was not a necessary requirement of the offence, but the mere possibility of a prejudice was enough. As we have seen, the finding of prejudice as envisioned in Dunn seemingly had little to do with conduct in relation to the instrument itself. But by removing the requirement for an actual prejudice, and replacing it with the need for a possible prejudice, the core of the offence becomes identified even further with conduct in relation to the instrument. In requiring a possible rather than an actual prejudice, the question of prejudice itself is removed from that of identifying the basis upon which the victim actually granted credit to the prisoner. Instead it becomes a more general calculation as to the likelihood that a prejudice will result from the conduct of the prisoner in relation to the instrument. In light of the above it can be seen that the relevant conduct in mind is that relating to a standard of what is normal and legitimate use of the instrument. Moreover the notional 'prejudice' in mind is tied directly to a calculation as to what constitutes improper use of the instrument. This stands in stark contrast to Dunn, where 'prejudice' concerned whether the victim gave credit to the person of the prisoner or their assumed character, a question not directly entailing consideration of the instrument.

Semblance

At this point we can make the general observation that intent was deployed in order to challenge certain formalities that had crystallised around the offence. As we have seen, with regards to those legal instruments traditionally protected by statute and common law, fraudulent intent was used to bring forgeries within the offence that, by reason of deficiency in form or substance, had little chance of having any actual legal effect. With regards to prejudice, fraudulent intent was used in order to overcome the necessity of making a causal link between the forgery and the victim's loss upon the particular facts. As we have also seen, corresponding with the undermining of these formalities was the use of intent to enable a more direct inquiry into the prisoner's conduct in relation to the instrument itself, dissociated from any particular effects in law or upon a specific victim.

However, focus on the prisoner's conduct in relation to the instrument does not by itself necessarily represent a significant break from certain aspects of the traditional understanding of the offence. Rather, it may simply be the swapping of one set of formalities for another. Traditionally criminality manifested itself in those acts in relation to the formalities of legal instruments which undermined their association with personal authority in the mind of the community and by operation of law, the most prominent example being the counterfeiting of a seal. On the face of it the focus upon conduct in relation to the instrument could simply be seen as a continuation of this formalism, albeit over a greater range of instruments. However, rather than criminality manifesting by virtue of a shared perception between law and community as to the link between instrument and personal authority, by the period considered here it may be seen to manifest in the act against the formalities of the instrument as defined by positive legal rules. In other words, on this account the focus on conduct in relation to the instrument could simply resolve itself to be a positivised version of the traditional basis for finding criminality in acts against the instrument's formalities.

On the face of it, evidence to support such an interpretation may be found in East's account. In particular it emerges in East's discussion of the necessity of a semblance between the forged instrument and that which is forged. Having cited Hawkins' principle that the instrument need not be valid in law, he then restricts the universality of its application to "where the false instrument carries on the face of it the semblance of that for which it is counterfeited, and is not illegal in its very frame."⁵¹³ Similar sentiments are expressed elsewhere, stating that "it is necessary that the forged instrument should in all essential parts have upon the face of it the similitude of a true one". These 'essentials' are illustrated in the section 'Of what instruments, &c, Forgery may be committed', where a summary is given of the mass of statutes regulating the different types of instruments used in private transactions becoming more prominent in eighteenth century England.⁵¹⁴

It may appear that the effect of these statutes is to expand the reach of the law, but only through the type of formalism associated with the traditional approach to forgery, tying these new offences to acts against the formalities of these instruments as positively defined by statute. This standard is expressed as the instrument's 'purport' or what it is 'on the face of it' by East in relation to a variety of different types of instruments. For example, in Gade's case,⁵¹⁵ the defendant was found guilty for forging a transfer for an interest or share which by law had arguably not properly been vested in the victim, but seeing as the forgery was "complete on the face of it" and "imported that there was such a description of stock capable of being transferred" it came within the offence, even if it would've been inoperable in law even if genuine.⁵¹⁶ Also, in Jones,⁵¹⁷ where a paper writing 'purporting to be bank note' failed many of the formalities required of a such an instrument and Lord Mansfield stated that "the representation of the prisoner afterwards could not vary the purport of the instrument", East states that the objection which persuaded the court to acquit was "*out of the very nature of the thing itself forged*", and that "In order to constitute

⁵¹³ East, *Pleas of the Crown*, 2:948.

⁵¹⁴ Ibid., 2:859–948.

⁵¹⁵ R v Gade, 168 English Reports 467 (1796).

⁵¹⁶ East, *Pleas of the Crown*, 2:874.

⁵¹⁷ R v Jones, 168 English Reports 204 (1779).

forgery there must be *some resemblance to the thing supposed to be forged, though it need not be an exact one*" and that it "must at least have *the principal constituent parts of that which it is intended to represent...*".⁵¹⁸ Such formal requirements also seem to extend to 'private' instruments, under which East cites a series of cases where the primary concern appears to be whether what is laid in the indictment sufficiently satisfies the objective criteria of a receipt. The standard is made more explicit in the discussion of warrants and orders. Here East stipulates that if such instruments "do not purport on the face of it, or be shown by proper averment, to be made by one having authority to command the payment of the money or direct the delivery of the goods, and to be compulsory on the person having possession of the subject matter" then it cannot be considered a warrant or order, but instead must be considered a mere 'request' outside the protection of the statute.⁵¹⁹

Occasionally the decisions of the courts as to whether an instrument was protected by statute blurred the lines between form and substance and, on the face of it, breaching the principle propounded by Hawkins and echoed by East. For example, in Wall's case, only recently decided in 1800 and still unreported when East was writing, a defendant was acquitted for forging a will because it was attested by only two witnesses, and thus would've been void by express enactment of the statute of frauds for want of the attestation of three witnesses. Similarly in Moffat's case⁵²⁰ the defendant was acquitted for forging an acceptance because the bill in question did not specify the place of abode of the payee, nor attested by any subscribing witnesses, and thus "if it had been a genuine instrument, it would have been absolutely void, and nothing could have made it good."⁵²¹ These cases illustrate well how in determining the level of 'semblance' required between the forged instrument and a true one, the courts could seemingly move closer or further way from the formalities of the relevant statutory regime. Although the concern governing this movement is not immediately apparent, the necessity for some connection is clear.

⁵¹⁸ East, *Pleas of the Crown*, 2:884.

⁵¹⁹ *Ibid.*, 2:936.

⁵²⁰ *R v Moffat*, 168 English Reports 317 (1787).

⁵²¹ East, *Pleas of the Crown*, 2:954.

Although the requirements as to the formalities of the instruments in forgery under the statutes may have mirrored those stipulated in other aspects of their regulation, the nature of this connection was not exhausted merely by a shared positive definition. This is evident in East's account of *Hawkeswood and Morton*.⁵²² In both cases it was objected that the instrument allegedly forged had not been stamped and so by statute would have had no effect even if genuine. The court endeavoured to draw a clear line between the requirements of forgery and other aspects of the statutory regulation, emphasising their different functions. The statutory regimes were primarily concerned with determining when such an instrument could be made use of in order to recover a debt. However these were "mere revenue laws, meant to make no alteration in the crime of forgery".⁵²³ Although an instrument may be unavailable to recover a debt for want of formalities "yet a man might equally be defrauded by a voluntary payment being lost to him", with the court stating that if the formalities required by the offence were tied too closely to other aspects of its regulation it would "carry the mischief to an alarming extent."⁵²⁴ East concludes the section by affirming the distinction through highlighting the lack of logic in seeing one as derivative of the other, stating that the requirements of the regulations "can only be applicable to a true instrument; for a forged instrument, when discovered to be such, never can be made available though stamped."⁵²⁵

A similar conflict between the formalities of the statutory regulations and those of the forgery emerged in *Palmer*, another case involving stamps.⁵²⁶ The dispute centred upon the meaning of the words "paper liable to the duties" upon which the counterfeit stamp was affixed. The defendant objected that the indictment brought against him was insufficient as the words could potentially mean *any* piece of paper, as any paper could potentially be used as one of the instruments which required a stamp according to the statute. The court rejected the objection and found the defendant guilty, stating that 'liable to the duties' was restricted to those papers purporting to be papers duly stamped, and as

⁵²² *R v Hawkeswood*, 168 English Reports 231 (1783). *Morton*, decided in 1796, was unreported at the time of East's publication

⁵²³ East, *Pleas of the Crown*, 2:955.

⁵²⁴ *Ibid.*, 2:956.

⁵²⁵ *Ibid.*

⁵²⁶ *R v Palmer*, 168 English Reports 279 (1785).

such liable to the duties. What purported to be liable to the said duties was determined by “the parties giving and taking it (being innocent)...persuaded that it was duly stamped.”⁵²⁷ As such the courts, in determining the scope of the provision, did not look directly to the formal requirements found in the statutory regulation, governing whether the relevant duty had in law been paid or not, but rather to the understanding of parties in how the instrument was used in every day practice.

East emphasises the importance of considering the required formalities of the instrument in light of its use in social practice beyond those areas where it had been formally acknowledged by the court. In his discussion of warrants and orders, although we have already seen East’s acknowledgment of the courts’ desire to distinguish them from mere requests through the employment of certain formalities, his presentation of the cases under the principle also indicate an awareness of other dynamics within forgery that touch upon such formalities. For example, in East’s summary of the judgment in Mitchell’s Case,⁵²⁸ cited as an authority for the above proposition, although he states that the defendant was acquitted on the basis that the forged order did not purport that the author had an interest or a disposing power over the goods, most space is given to outlining the reasoning of the single dissenting judgment. This judgment emphasised how the word ‘order’ was “in daily use among traders in a larger sense than was then contended for”, extending beyond the assertion of rights and interests around which the formalities were established, and in this light the facts “came within the mischief and the words of the act.”⁵²⁹ Moreover, in his summary of Williams,⁵³⁰ a case concerning similar facts, East highlights how judges decided upon the authority of Mitchell’s case “though most of them said they should have doubted the propriety of that determination had it been *res integra*” but felt it had become so established it was difficult to depart from.⁵³¹

⁵²⁷ East, *Pleas of the Crown*, 2:894.

⁵²⁸ Mary Mitchell’s Case, 168 English Reports 59 (1754).

⁵²⁹ East, *Pleas of the Crown*, 2:937.

⁵³⁰ R v Williams, 168 English Reports 160 (1775).

⁵³¹ East, *Pleas of the Crown*, 2:938.

From East's presentation of the remaining cases in the section it appears that the courts' chief concern regarding the formalities were not directly touching upon the core of the offence, but rather in the more technical and procedural matter of the sufficiency of the indictment. For example, in Clinch's case most of the judgment summary concerns the insufficiency of the indictment where it set forth the allegedly forged order, failing to aver the circumstances that would give the order operation in daily practice.⁵³² The discussion of the other cases in the section primarily revolves around the extent to which the order or warrant set forth in the indictment assumed the facts that gave it operation in actual practice, or whether they needed to be indicated and averred in the indictment, rather than touching upon the substance of the offence itself.

From the preceding analysis we can see the grounds upon which the formalities of the instrument were determined, and how they related to forgery, differed between the traditional and later law. Traditionally, the formalities governing legal instruments were grounded in a symbiotic relationship between law and community. They were the signs or symbols through which the perception of personal authority shared throughout the community was recognised in law, and the means by which that authority was translated into legal authority through the exercise of rights. Semblance, however, has a very different source. Its determination is firmly distinguished from what formalities are required in order for an instrument to be valid at law and thus enable the exercise of rights. It instead has a more obviously social source, being in essence an attempt to capture within law the manner in which an instrument is used in wider social practice. As such, underpinning formalities of instruments stipulated in the traditional and modern law are two very different conceptions of law's relationship to society. The gap between law and society was transcended in the traditional mind by the universal recognition within the community of personal authority and its associated symbols and signs. Formalities in the traditional law represented the point at which law and community combined; where law grounded itself in community, and community was embodied by law. Regarding semblance, however, the gap between law and society becomes the very space in which it is calculated and determined. The

⁵³² R v Clinch, 168 English Reports 372 (1791).

judgement as to semblance does not assume an equivalence between social relations and their representation in legal forms. On the contrary, by consciously responding to an image of how the instrument is used in social relations, it strives to represent that which it simultaneously acknowledges to lie beyond itself.

Identifying what underpinned the courts' determination of semblance brings us closer also to uncovering what shaped intent's coming to be a central feature of forgery, beyond its negative function in breaking down the traditional formalities. This link between semblance and intent is best illustrated by East's attempt to deduce a general principle as to how semblance is determined. He variously expresses the semblance required of the instrument by law as to be "so like as to be calculated to deceive where ordinary and usual observation is given,"⁵³³ and similarly "calculated to impose upon persons in general".⁵³⁴ There are two points worth noting concerning this principle. First, East doesn't place discussion of this principle in the lengthy section covering the types instruments protected by forgery, even though this is where the necessary formalities associated with the various types of instruments is discussed in the most detail, and their relation to other aspects of their statutory regulation. Instead he discusses it in the sections immediately preceding and following it, concerning the nature of false making or alteration and validity of the instrument respectively. Whereas the former section is, with a few exceptions already noted, tasked with defining the instruments protected by forgery at the common law or statute, a seemingly straightforward exercise in stipulating the key objective features of each instrument, the latter two are concerned with a more expansive analysis of the types of conduct that come within the offence. In particular the discussion in each more directly touches upon the point in the conceptualisation of the offence where the fraudulent design or intent of the defendant is translated into acts that operate to fulfil it.

This leads us to the second point of note. What is meant by what the instrument is 'calculated' to do encompasses two seemingly different types of inquiry, with not

⁵³³ East, *Pleas of the Crown*, 2:858.

⁵³⁴ *Ibid.*, 2:950.

necessarily reconcilable answers. On the one hand it could speak to the defendant's calculation – the operation he or she intends the instrument will have when put into use. On the other hand it could speak to a broader calculation – the operation the instrument will actually have according to the pattern of shared understandings and behaviours within society. To put it in modern terms, the subjective and objective questions are not firmly distinguished. This indeterminate area between the intent of the defendant and form of the instrument is illustrated well by Elliott's case, cited by East himself.⁵³⁵ The case concerned a forged bank note which was missing certain material features, in particular the omission of a water-mark and the word 'pounds' next to 'fifty'. When the decision was respited for judgment, the court considered that whether the note purported to be for fifty pounds was to be a matter properly to be left to the jury, but in passing their own opinion upon the facts they stated that the note did so purport, and relied on the fact that, judging from other circumstances it was clearly intended to be so.

6. Conclusion

This chapter has sought to address the emergence of the abstract individual in the attribution of liability in criminal law. This has been done with special regard for two offences: arson (and later, malicious mischief in general) and forgery. With regards to both offences it can be seen that at the beginning of the period under review the abstract individual did not figure significantly in the attribution of liability. The idea of malice that sat at the core of arson in Coke and Hale placed little emphasis upon the idea of positively proving the state of mind of the defendant. To the contrary, the finding of criminality was largely placed in the hands of the jury. Burning another's house was considered to be an act which manifested a spirit of enmity that threatened to tear apart communal bonds, the identification of which was left to the perception of the community in the form of the jury. The abstract individual was similarly absent in the attribution of liability in forgery during the same period. Although Coke incorporates some discussion of intent, this is mainly in

⁵³⁵ Ibid., 2:951.

relation to the types of instruments protected by the Elizabethan statute rather than as a positive requirement for liability. Rather, the act against the instrument was deemed to manifest an act against the personal authority of the victim. The finding of criminality underlying both arson and forgery during this period drew heavily upon a shared perception within the community (amongst those who were jurors at least) of conduct which manifested a dangerous presence within the community.

The emergence of the abstract individual in arson and forgery was examined by tracing increased focus of intent in the attribution of liability. In arson this was illustrated through the transformation of the notion of 'malice' that traditionally underlay arson. With the development of the 'malicious mischief' category of offences, of which arson was a part, the function of malice was subtly transformed. Whereas the traditional sense of malice rooted legal order in the community's perception of criminality, the use of maliciousness as a category for organising the substantive law signified an important transformation in the perception of legal order. By employing malice as a technique for organising offences, courts and commentators were required direct their attentions to how within the overall scheme of criminal law offences were brought together within the general category of malicious mischief, and what differentiated the offences within it. Courts were thus forced to articulate the rationality of the law by reference to its purpose in protecting an identifiable interest, rather than relying upon the perception of the community. As such, malice as a condition of liability came to signify something that existed in specific relation to a positively defined interest, making malice itself the object of representation within legal discourse and opening the way for its articulation in terms of specific states of mind.

In relation to forgery the emergence of the abstract individual took a slightly different path. The consolidation of fraudulent intent as a positive condition of liability in forgery was achieved through dissociating the relationship between the act and the specific prejudice suffered. Traditionally the act of forgery of a legal instrument was inimical with the suffering of a prejudice. This prejudice was not directly located in the threat to a positive legal right itself, but more accurately was because legal rights being inimical to the

moral order of the community, any act against a legal instrument was a direct act against the personal authority in whose name the instrument was forged. This association was weakened by the expansion in the use and number of instruments that accompanied increasing importance of credit throughout English society. The interaction between strangers that these instruments enabled cut away the circumstances that underpinned the traditional bond between legal right and personal authority. The move from the requirement of an actual prejudice to the mere possibility of prejudice transformed the nature of prejudice itself in terms of what it signified. Whereas the requirement of an actual prejudice was underpinned by the assumption of a unity between the legal order and the community's own sense of order, insofar as any act against an instrument of the legal order was presumed to manifest an act against personal authority, the move to only requiring the possibility of a prejudice introduced an explicit calculation as to the general purpose of the offence in relation to the positive interests it was supposed to protect. It was against this background that fraudulent intent came to be at the core of the offence. The concept of fraudulent intent in doctrine moved the focus of the offence specifically towards the relations through which these positive rights and interests were realised, and enabled the breakdown of formalities which had crystallised around the offence conceived as an act against personal interest.

CONCLUSION

The argument developed in the thesis concerning the abstract individual of modern criminal law has made two distinct but related claims. The first is historical, identifying developments in the seventeenth century as the location for the origins of the abstract individual. This stage of the argument was developed in Chapters Two and Three. Chapter Two identified developments in the law of treason and the treason trial during this period as a key area of interest. With regards to the law of treason, it was seen that abstract thought about the person in the shape of a concern with the criminal or treasonous mind as a component of criminal conduct emerged as a central feature of the law during this period, receiving its clearest expression in Hale's writings and reflected also in the writings of other prominent commentators on particular trials during this period. In order to demonstrate that what was being identified in the law of treason was not restricted to the reflections of certain commentators and pamphleteers but a key moment in the emergence of abstract thought about the person in the criminal law connections were made between the sense of the criminal mind articulated in these writings and other institutional developments associated with the beginnings of a specifically modern system of criminal law, in particular the reform of the treason trial at the end of the seventeenth-century granting defendants certain procedural rights such as the right to defence counsel and a copy of the indictment. Drawing upon an analysis of treason trials in the period leading to their reform and which were the subject of criticism by contemporaries who were eventually successful in their campaign for reform of the trial, and also upon an analysis of the criminal mind as it emerged in writings on the law of treason bringing forward its specific nature as a component of criminal conduct, it was argued that an association between these two

developments can be made on the basis that both were concerned with the distinction between fact and law. Whilst received understandings of the distinction between matters of fact and matters of law structuring the traditional model of the treason trial and justifying the denial of defence counsel to defendants were being challenged and undermined in the court room, the sense of the criminal mind emerging in the law of treason was rooted in a notion of criminality which could only be established through interpretive engagement with the law rather than manifesting or declaring itself before the court.

By focusing on the law of treason and the treason trial, Chapter Two provided the opportunity to give a detailed illustration of the origins of the abstract individual not only in developments in the criminal law of the seventeenth-century but also in its practice and procedure. Chapter Three also focuses on this seventeenth-century period as a key moment in the emergence of the abstract individual of modern criminal. However, whereas Chapter Two was focused specifically on developments in treason, the perspective of Chapter Three is broader, tracing the emergence of the criminal mind across seventeenth-century criminal law generally and locating this development within reflections on the nature of legal reasoning and the nature of law itself in order to locate it within this period more concretely. The chapter begins by building on the analysis of the law conducted in Chapter Two, returning to the writings of Coke and Hale in order to trace the emergence of the criminal mind across a broader range of offences in order to develop a more general sense of its nature as a component of criminal conduct. It is argued that neither author understood the criminal mind as a formally distinct condition of liability, but rather as a source of evidence to be drawn upon in giving specific shape and substance to conduct prohibited by the offence. In doing so it brings forward the sense in which the criminal mind in the seventeenth century was understood as an interpretive concept – a concept which was not itself subject to abstract analysis and definition, but rather referred to in guiding the practice of interpreting and applying rules in the courtroom in order to identify the conduct described by such rules in general and abstract form.

The criminal mind as it emerged in seventeenth-century criminal law given definite shape, Chapter Three goes on to locate it more concretely within this period by tracing connections between the specific features of it brought forward by the thesis so far, in particular its character as an interpretive concept, and developments in general theorising on the nature of legal reasoning and law itself in the seventeenth century. An analysis of works on legal reasoning from the late-sixteenth and seventeenth century is conducted where it is demonstrated that during this period there was a growing sense of the distinctiveness of the legal order from the natural or social order forming its wider environment, with the legal order itself characterised by the artificial and abstract representation of this wider environment in the form of general rules. Moreover, it is argued that corresponding to this development in the nature of legal order emphasising its representative function is a sharpened focus on the role of interpretive practices in the law where the general and abstract propositions of legal rules are constantly tested against their application to concrete and particular circumstances presented before the court, reflexively determining the specific shape and substance of the rule, the relationship between it and other rules, and the possibility of exceptions or qualifications to the rule. It is then outlined how this vision of legal order as an abstract and artificial representation of the community found prominent expression in customary concepts of law developed by seventeenth-century common law theorists, the constitutive connection between custom and reason capturing the responsiveness of institutional expressions of law in the form of rules to practices and circumstances in the wider environment of the law, whilst also showing how processes of change and development in the law which such responsiveness drew attention to forced the nature of its customary foundation to be rethought as its claim to historical continuity came under challenge. Against this background it is argued that it was the interpretive practices of the courts themselves that became the focus of the claim for the historical continuity of the law, tracing a development in common law theory from a broadly Cokean perspective emphasising law's unchanged nature to another identified with Selden and Hale where the continuity of law was explicitly identified with its interpretation in light of evidence of its usage within the community presented before the court, reflexively giving that law its specific shape and character. The chapter concludes by making concrete connections between the criminal mind being articulated in the criminal law and developments in common law theory, arguing that the criminal mind was the symbolic

expression within the criminal law of interpretive practices conceived more generally by seventeenth-century common law theorists as a symbolic expression of the nature of law itself – the point at which the institutional expression of law in general and abstracted form was grounded in and realised as a part of the life of the community itself.

In turning to developments in the eighteenth and early-nineteenth centuries, the role of Chapter Four in the historical analysis is to demonstrate how the abstract individual expressed by the criminal mind, the origins of which Chapters Two and Three identified with specific developments in the seventeenth-century, was drawn upon in this period as the criminal law faced new problems arising from developments within the criminal law itself and its wider social environment. The chapter places particular emphasis upon how extensive legislative intervention creating a myriad of new offences of narrow scope in response to particular crises or problems and increasing the severity of punishments for seemingly minor offences was perceived to have severely undermined and disrupted the internal consistency and coherence of the criminal law. Emphasis is also given to the extension of the criminal law to protect a broader range of interests and regulate different types of activities as the criminal law came to operate in an increasingly diverse and complex social environment during this period. The chapter focuses on the offence of forgery and the category of offences labelled malicious mischief, illustrating first the traditional conception of the criminality of these offences prior to the eighteenth century before tracing their development through criminal law treatises and cases of the eighteenth and early-nineteenth centuries. It is shown how as these offences developed from the seventeenth-century through to the early-nineteenth century interpretations of their criminality shifted from being rooted in the personal malice or betrayal manifested by conduct criminalised towards being articulated in terms of the abstract state of mind of the accused. This development is demonstrated to corresponded with the extension of these offences through successive legislative enactments to cover a broader and increasingly complex range of activities in which the traditional view of the criminality of these offences as residing in personal malice or betrayal were insufficient to protect interests which could be infringed by increasingly abstract and distant forms of social interaction. It is argued that throughout this process both treatise writers and the courts were drawing upon the criminal

mind as an interpretive concept developed by the preceding chapters in responding to these developments and seeking to impose a sense of order and structure upon the criminal law, placing at its core a sense of criminality which was both responsive to the public function of criminal law exercised through general and abstract rules protecting interests identified and defined by the law whilst presenting the criminality of interferences with such interests as realised only in light of evidence presented before the court concerning the particular defendant and the circumstances surrounding the alleged interference speaking to the defendant's state of mind.

The historical argument developed in Chapters Two and Three identifying the emergence of the abstract individual with developments in the seventeenth-century and the evidence of its continued purchase in the face of legal and social transformations outlined in Chapter Four is drawn upon in making a conceptual argument concerning the sense of criminality embodied by the abstract individual and what it reveals about the nature of criminal law itself. In particular the thesis develops the concept of the 'lawless spirit' in order to elucidate and explain the sense of criminality embodied by the abstract individual as it developed during this period. The foundations for this argument are laid in Chapter One where the patterns of manifest and subjective criminality developed by Fletcher as concepts for explaining the historical development of criminal law doctrine are introduced and analysed. Whilst the value of these concepts is acknowledged, it is argued that their potential limitations are indicated by uncertainties concerning the role and status of the criminal mind and criminal act in relation to the patterns of manifest and subjective criminality respectively. It is suggested that the source of these limitations may reside in the theory of the nature of criminal law Fletcher associates each concept with, suggesting further that insofar as these concepts are intended to explain historical developments in criminal law doctrine their explanatory power could be further refined by locating each theory within the historical development of the criminal law itself, which is then put forward as the nature of the enquiry upon which the conceptual argument of the thesis is developed.

The concrete shape of the lawless spirit is then developed through the historical analysis conducted in Chapters Two and Three identifying the emergence of the abstract individual in the seventeenth-century with the increasing importance attached to interpretive practices in the practice and theory of criminal law and law in general during the same period. Two features of these practices are drawn upon in giving shape to the lawless spirit. The first concerns the basis upon which conduct was criminalised by those offences in relation to which the criminal mind was first articulated. Common to each of these offences was the growing perception that at their core was a prohibited interference with interests identified and defined by the law, with rules defining these offences describing such conduct in general and abstract form. This is given its fullest expression in Chapter Two where it is shown that the legal developments leading to reform of the treason trial were primarily rooted in the extension and consolidation of the doctrine of constructive treason within the law of treason. It is argued that the rationale behind the doctrine of constructive treason was a notion of treason conceived as a crime against the state, laying the foundations for an interpretation of compassing the death of the king as an interference with the lawful authority of the king as head of state. Conduct was criminalised on the basis of concerning the interest the public was presumed to have in the security of the distribution of political and legal authority defined by the constitution, requiring such conduct be both targeted directly at interfering with this interest and sufficiently proximate to interfering with it to constitute a concrete threat. This was contrasted with traditional interpretations of the offence rooted in a concept of treason as the breach of a moral duty owed to the person of the king himself, where the boundaries of the offence were more indeterminate, relying upon the notion that conduct constituting such a breach was immediately recognisable to a community for whom the network of personal bonds and obligations upon which the moral authority of the king rested shaped all aspects of its experience. That this was a general feature of offences where the criminal mind was first articulated is developed in Chapter Three in relation to *felo de se* and larceny where an analysis of their legal and social development highlights that by the seventeenth-century at the core of these offences was the prohibition of conduct interfering with an interest identified and defined by the law.

That the criminal mind emerged in relation to offences with the interference with interests identified and defined by the law at their core speaks to one aspect of the sense of criminality which the abstract individual conceived by means of the criminal mind embodied. Consistent with the definition of the concepts which Fletcher develops, the sense of criminality articulated in terms of the criminal mind is distinguished from the concept of manifest criminality insofar as it is not a direct reflection of the moral experience of the community but constituted in relation to interests identified and defined independently by the law itself. However, the historical analysis in Chapters Two and Three locating the origins of the criminal mind specifically within interpretive practices developing in seventeenth-century criminal law and bringing forward the nature of the criminal mind itself as an interpretive concept preclude the conclusion that the sense of criminality it embodies can be identified with the concept of subjective criminality as defined by Fletcher. As Chapter One outlines, it is intrinsic to the concept of subjective criminality that the definition of conduct interfering with legally protected interests is the product of authoritatively imposed positive rules, and correspondingly that the criminal mind takes the form of a condition of liability formally distinct from such conduct. The analysis of Coke and Hale's criminal law works in Chapter Three tracing the emergence of the criminal mind showed how they did not conceive the criminal mind as a condition of liability formally distinct from rules defining conduct interfering with legally protected interests, but rather that the criminal mind was evidence to be drawn upon in the interpretation and application of those rules in giving the conduct defined by them specific shape and substance. Moreover, as was most clearly demonstrated in the analysis of the criminal mind in the context of treason trial practices conducted in Chapter Two, this sense of the criminal mind escaped reduction to a particular state of mind or type of knowledge in the form of abstract definition or analysis, but was a fundamentally interpretive concept which only fully took shape within the interpretive practices of the court where the general and abstract form of the rule identifying types of conduct prohibited by the offence was interpreted in light of evidence presented before the court concerning the particular defendant and the circumstances surrounding the alleged interference with the interest protected by the offence.

There are therefore two grounds for distinguishing the sense of criminality embodied by the criminal mind as developed by the historical analysis conducted in the thesis from the concept of subjective criminality as put forward by Fletcher. The first concerns the character of the criminal mind itself. Whereas within the pattern of subjective criminality the criminal mind forms the primary focus of analysis and definition, as it emerged in the seventeenth-century it has been shown to be an interpretive concept which only took shape within the interpretive practices of the court and was irreducible to abstract definition outside it. The second concerns the nature of the practice of which the criminal mind was a part. Within the pattern of subjective criminality the criminal mind is identified with a practice in which criminal conduct is defined by authoritatively imposed positive rules. By contrast, the criminal mind as it emerged in the seventeenth century has been shown to be specifically associated with and integral to the practice whereby rules which, although describing conduct interfering with legally protected interests in general and abstract form, were not authoritatively imposed but only given shape and substance through interpretation and application in light of evidence presented before the court.

The sense of criminality embodied by the criminal mind identified with developments in the seventeenth-century distinguished from the concept of subjective criminality put forward by Fletcher, the claim made in Chapter One that Fletcher's concepts could be refined by locating the theories of the nature of criminal law associated with each within the historical development of the criminal law itself is substantiated in Chapter Three where specific connections are made between the criminal mind and developments in seventeenth-century common law theory. At the conclusion of this chapter it is argued that where interpretive practices were the symbolic expression of the customary concept of law developing within seventeenth-century common law theory, the nature of the criminal mind as an interpretive concept was the symbolic expression of that customary concept of law within seventeenth-century criminal law. The criminal mind was the means by which criminal law's artificial representation of the life of the community in the form of general and abstract rules was realised as a part of the life the community itself, demanding conduct

identified by these rules as criminal be interpreted through the prism of the experience of the community gathered in the court in light of evidence presented before it. However, that the recognition of criminality resided in the experience of the community did not render the criminal mind an expression of the concept of manifest criminality put forward by Fletcher. The concept of the criminal mind was not formed as a direct reflection of the moral experience of the community, but intrinsic to its nature as an interpretive concept was that it was constituted only in relation to interests identified and defined by the law and protected by rules prohibiting their interference. In this sense, the criminal mind as an interpretive concept drawing upon the experience of the community did so in a manner where the experience of the community itself was shaped and interpreted through the prism of the public function of criminal law as prohibiting conduct interfering with legally protected interests.

It is in this dynamic between criminality residing in the experience of the community and the experience of the community itself shaped by the public function of criminal law that the notion of the criminal mind the thesis identifies with developments in the seventeenth-century can be said to embody a sense of criminality characterised as the lawless spirit. The aspect of lawlessness speaks to the sense in which the criminality of the person envisioned through the criminal mind was recognised by the community itself, its perception and experience of criminality drawn upon within the interpretive practices through which the criminal mind as a component of criminal conduct was realised and gave specific shape and substance to the rules prohibiting such conduct. The grounds for this claim are laid by the historical analysis conducted throughout the thesis locating the origins of the criminal mind in seventeenth century criminal law, tracing its emergence within interpretive practices and bringing forward the character of the criminal mind itself as an interpretive concept. The criminal mind embodying a sense of criminality constituted in part by the community's experience and recognition of lawlessness speaks to the intrinsic link between the criminal mind as a component of criminal conduct and a theory of the nature of criminal law which can be identified with the customary concept of law explored in Chapter Three, in which the criminality the criminal law targets and punishes is identified only within the constant contextualisation of its abstract and general rules performed within

the interpretive practices of the court realising those rules as a part of the life of the community. The criminal mind conceived as the lawless spirit is in this sense at least partly opposed, if not wholly opposed, both to the notion of criminality as the product of authoritatively imposed positive rules and to the notion that the criminal mind itself can be reduced to particular states of mind.

The aspect of spirit on the other hand speaks to the sense in which the criminality of the person envisioned through the criminal mind is not fully-embodied within the moral experience of the community but is recognised only when that experience is reconstructed from the specific viewpoint of the public function of the criminal law as prohibiting conduct interfering interests identified and defined by the law. The association between the criminal mind and this aspect of the sense of criminality it embodies is illustrated in several parts of the thesis, in particular where the specific character of those offences it emerged in relation to are explored in Chapters Two and Three. The sense of criminality embodied by the criminal mind both residing in the experience of the community and yet constituted only in relation to interests identified and defined by the law independently of this experience, the sense of abstraction conjured up by the image of the spirit in the lawless spirit is realised insofar as it resides within the experience of the community as a dangerous presence yet takes on no specific or concrete form independently of the institutional expression of the criminal law in the form of general and abstract rules. Just as the customary concept of law developed by seventeenth-century common law theorists explored in Chapter Three rooted the institutional form of law within the life of the community by asserting the necessity of the law expressed in such form to the life of the community, the spirit of the lawless spirit speaks to the sense in which the institutional form of the criminal law is realised within the life of the community by asserting that criminality was in part constituted by interference with interests identified and defined by the law as a necessary and inescapable aspect of the life of the community. The main historical and conceptual claims of the thesis now summarised, the rest of the conclusion moves on to relate these points to the prevailing literature outlined and critically analysed in Chapter One.

Chapter One conducted a critical overview of the prevailing literature with the aim of drawing from these accounts the main themes involved in developing an historical analysis of the abstract individual in modern criminal law, and the problems confronted therein. It was seen that other authors have tended to associate the origins of this abstract individual with two different features of the historical development of modern criminal law. On the one hand, authors such as Norrie and Ramsay place particular emphasis upon the importance of positive law in modern criminal law. Whereas the strength of the ruling class ideology concerning the hierarchical character of the natural or customary moral and social order meant criminal law could traditionally protect the interests of the ruling classes by drawing upon widely shared social norms, both Norrie and Ramsay characterise capitalist society as marked by an open and inescapable conflict between different social and economic groups over the substance of legal rights. No longer being able to assume their interests would be protected by the enforcement of moral understandings shared throughout the community, the ruling classes enshrined their interests in positive law enacted by the courts and the legislature, thus isolating the question of their legal authority from the moral and political conflict over their substance within the community. Norrie and Ramsay identify the abstract individual with the ideological justification of those practices through which these interests are protected. Critiquing what they label 'orthodox subjectivist' concepts of individual responsibility in criminal law doctrine, both assert that by attributing liability on the basis of establishing psychological states of mind such as intention or recklessness independently of morally substantive considerations arising from the particular harm in question, these practices claim legitimacy by presenting themselves as respecting the values of individual freedom and formal equality, whilst simultaneously masking the fact that in its substance the criminal law protects particular interests over which there is significant social and political conflict.

On the other hand, Farmer and Lacey situate the abstract individual within an account of the diversity of practices operating within modern criminal law, identifying it in a

particular branch of practices associated with the common law tradition which claim to root law in the life of the community. Whereas Norrie and Ramsay focus on how the liberal ideology of individual justice shaped the historical development of modern criminal law, Farmer and Lacey bring forward the importance of the task of maintaining public order, and how arguably it shaped practices independently of the concern that they be perceived as legitimate by securing certain values. The role of modern criminal law in maintaining public order is evidenced in two related aspects of its historical development. First, as society underwent rapid processes of urbanisation and industrialisation a new range of activities and interactions came within the purview of the criminal law. On the one hand the increasing prevalence of inherently dangerous activities associated with heavy industry and mass transportation meant the criminal law became increasingly concerned with managing risk and distributing the burden of its reduction to different social actors, evidenced in the growth of regulatory legislation employing strict and absolute standards of liability to criminalise conduct. On the other hand, with the growth of urban spaces characterised by interaction between strangers where the potential for anonymity meant informal methods of enforcing conformity such as social pressure became less effective, the criminal justice system sought to exercise control over disorderly conduct by rigorously enforcing low-level breach of the peace offences and licensing regimes aimed at regulating businesses perceived to cause such behaviour, such as public houses. Secondly, as it expanded its jurisdiction over a broader range of social life and aimed to regulate it more intensively an increasing number of defendants came to pass through the criminal justice system, placing pressure on the courts to generate verdicts quickly and efficiently. How to coordinate practices efficiently with the resources available became a primary concern distinct from the question of whether justice was being done to the particular defendant, leading to a heavy reliance in securing convictions upon evidence as to the defendant's character provided by policing and other administrative agencies.

Farmer and Lacey's analysis of the abstract individual of modern criminal law situates it within this awareness of the fact that many, if not most, of the practices associated with criminal law during the period in which it came to prominence in theory and doctrine do not demonstrate an overwhelming concern with individual justice, but rather

with the task of maintaining public order. In particular, both associate modern doctrine and theory's placing of the abstract individual at the core of criminal law with an attempt to defend its autonomy against those forces threatening to transform its practices into mere instruments for securing public order. By developing sophisticated *mens rea* doctrines organised around the concept of individual responsibility, not only do these doctrinal and theoretical accounts establish the criminal law as a unique body of knowledge and techniques for identifying and controlling deviant behaviour distinct from that which may inform other more managerial or administrative practices, but they also present modern criminal law as having a moral foundation in the protection of individualist values, seemingly endowing the judiciary with the authority to supervise those instrumental practices for their respect of such values. However, the criminal law's autonomy is not secured by merely asserting that it should secure a particular range of individualist values, but through the stronger claim that this is part of the very nature of the practice of criminal law itself. Both Farmer and Lacey argue that these doctrinal and theoretical accounts seek to defend the autonomy of the criminal law by asserting its common law origins. The individualist values they claim to be protected by criminal law are uncovered to be drawn from an analysis of only a narrow range of traditional common law offences, with the result that these values are presented as being of a 'pre-political' character insofar as they are immediately recognisable by the community without the need for positive enactment. Whereas Norrie and Ramsay associate the abstract individual with the growing importance of positive law in the practice of criminal law and the need for those practices to be legitimised, by contrast Farmer and Lacey identify it with those practices underpinned by a vision of law as rooted in the moral life of the community, associated in particular with the common law tradition.

Chapter One engaged also in a critical analysis of these accounts of the abstract individual in order to highlight their potential limitations. A tension was identified in Norrie's argument between the ideological character he attributes to orthodox subjectivist doctrines on the one hand and their actual dominance in criminal legal practices on the other. Whereas Norrie identifies the ideological character of orthodox subjectivist doctrines in a direct link between their claim to legitimise judgements and their capacity to exclude substantive considerations from the process of reaching such decisions, underlying the

actual dominance of these doctrines in practice is a seemingly more nuanced interaction with such substantive considerations. This was illustrated through an analysis of Norrie's account of how doctrine develops in the courts, focusing in particular on the test of oblique intention. On the one hand the very fact that a decision represents a development in doctrine signifies that substantive considerations were a direct and immediate factor informing the judgment. This development is motivated by a concern on behalf of the court that the received formulation was incapable of adequately capturing the substantive considerations in play so as to produce a legitimate outcome, and so needed to be narrowed or widened in light of this. However, as Norrie acknowledges, these decisions informed by substantive considerations are still articulated in orthodox subjectivist terms by reference to psychological states of mind. The continuing adherence to the orthodox subjectivist approach in such judgments where substantive considerations are a direct and immediate factor behind the judgment is difficult to square with Norrie's more general argument concerning the ideological character of orthodox subjectivist doctrines linking their claim to legitimise judgments to the exclusion of substantive considerations in reaching them.

A tension was also identified in Ramsay's argument concerning the ideological quality of concepts of responsibility in modern criminal law. Ramsay characterises the claim made for concepts of responsibility in legitimising judgments on the basis of their role in securing civil or social rights associated with democratic citizenship. Whilst orthodox subjectivist doctrines are presented as securing civil rights insofar as they respect the defendant's individual freedom and formal equality by requiring wilful conduct and excluding substantive considerations from judgments of responsibility, the use of strict and absolute standards of liability in criminal law's regulatory function are presented as securing social rights by effectively distributing the burden for reducing the risk of harmful consequences to those best placed to bear it, creating an environment in which effective autonomy can be enjoyed. It was seen that underlying this aspect of Ramsay's argument was the view that the claim of these concepts of responsibility to legitimise judgments is made on the basis that the area of criminal law to which each applied could be determined in the abstract according to the types of interests at stake in each. Openly acknowledging

that the respective areas to which each concept of responsibility applied necessitated determination by positive enactment would be to acknowledge also the existence of political conflict over the interests underlying each and therefore the essential indeterminacy in values of formal and effective autonomy underlying civil and social rights themselves. Although Ramsay acknowledges the reality of this indeterminacy in the relation between civil and social rights in his argument concerning the ideological quality of the concepts of responsibility which draw upon them in claiming to legitimise criminal legal practices, citing as evidence of this indeterminacy political debates concerning the limit between formal freedom and effective autonomy which are only effectively resolved by positive enactment in the legislature and the courts, it was argued that by marginalising the role of positive law in his characterisation of the claim made by concepts of responsibility to legitimacy he risked distorting the sense in which civil and social rights are perceived to enjoy normative force in democratic political communities. It was argued that the very concepts of civil and social rights understood as components of democratic citizenship presumed the existence of some degree of political conflict over the interests at stake in identifying the limit between formal freedom or effective autonomy, and as such claims made in the name of civil and social rights presume the normative force of positive enactments made by those political and legal institutions charged with determining these limits. The marginalising of positive law in Ramsay's view of concepts of responsibility as claiming legitimacy by virtue of securing civil and social rights is arguably in tension therefore with the very concept of civil and social rights as components of democratic citizenship.

Farmer and Lacey's account of the abstract individual as employed by modern doctrine and theory to invoke an image of criminal law's origins in the protection of community values, defending its autonomy against instrumentalisation by the administrative state, also contains potential limitations. In particular it was argued that the communitarian character Farmer and Lacey attribute to the individualist values informing modern doctrine and theory undermined the general applicability of the principles they develop. On the one hand, in order for these doctrines and principles to form an effective defence of the criminal law's autonomy they must be capable of claiming a superior

normative force than those positive laws establishing instrumental practices. For Farmer and Lacey modern doctrine and theory does this by envisioning the criminal law as having moral foundations, ensuring that those doctrines and principles securing individualist values enjoy general applicability across instrumental practices by virtue of their superior moral, and therefore legal authority compared to mere positive law, empowering the courts to supervise such practices. On the other hand, however, by attributing a communitarian character to these individualist values Farmer and Lacey arguably cut away at the basis upon which its doctrines and principles claim a superior normative force to those positive enactments establishing instrumental practices. Whereas those theories establishing the inherent moral worth of the individual on the basis of its abstract metaphysical status demand its protection in law on the basis of the individual's very separateness from the community, by locating the moral worth of the individual in its recognition by the community as such the task of securing of individualist values through doctrines and principles seemingly envisions the criminal law as an instrument for the protection of social interests. When one considers that instrumental practices in modern criminal law are often defended on the basis that they are the most effective means of protecting social interests identified by political institutions and positively enacted into law, one can see that the vision of law as protecting individualist values of a communitarian character risks effectively replicating the vision of law underpinning instrumental practices, albeit at a higher level of abstraction. Where those doctrines and principles informed by individualist values on the one hand and positive law establishing instrumental practices on the other share the same basis in the protection of social interests, it is difficult to see how such doctrines and principles can claim to enjoy the superior normative force which ensures its general applicability across instrumental practices and invests the courts with the authority to supervise such practices.

The critical analysis of the perspectives engaged with in Chapter One is intended to guide the historical analysis conducted in the rest of the thesis by situating the concept of the abstract individual in the relationship between positive law and community. On the one hand, from Norrie and Ramsay's argument we gain the important insight that the emergence of the abstract individual was associated with the increasingly prominent role

performed by positive law in identifying those interests which were to be protected by criminal law. Their analysis of orthodox subjectivist doctrine highlights how the emergence of the abstract individual was part of a process through which legal judgments of responsibility were differentiated from the moral judgment of the community, transforming it into a technical discourse whose normative force did not depend directly upon it reflecting shared norms. However, the tensions identified in Norrie and Ramsay's attempt to account for the normative force of these doctrines indicate a more general limitation in their historical analysis of the abstract individual. Whereas the ideological character Norrie and Ramsay attribute to concepts of responsibility is premised on the argument that their claim to legitimise practices is directly linked to their exclusion of considerations arising from the particular interests protected by criminal law from shaping judgments, the critical analysis demonstrates that the normative force of these concepts necessarily entails some form of open recognition of the existence of conflict over the value attributed to interests protected by the criminal law and the role of positive law in settling or containing such conflicts. This indicates that whilst the emergence of the abstract individual may indeed be linked to the increasingly important function performed by positive law in identifying interests to be protected by the criminal law, the argument that the concept of the abstract individual emerged so as to exclude or 'mask' this function may be misguided. On the contrary, the operation of those doctrines structured around the concept of the abstract individual in criminal legal practices suggests that their normative force is premised upon an open acknowledgement of this function performed by positive law within the community.

On the other hand, from Farmer and Lacey's argument we gain the important insight that the emergence of the abstract individual was connected to wider transformations undergone by the criminal law as the range of its jurisdiction expanded over a broader range of social life and the nature of its interventions became increasingly concerned with the task of maintaining public order. Their attempt to locate the individualism of modern doctrine and theory within these developments as a defence of the criminal law's autonomy against instrumentalisation by the administrative state illuminates the origins of the abstract individual in the common law and its vision of law as ultimately rooted in the life of the community. However, the tension identified in how the individualism of modern

doctrine and theory defends the criminal law indicates a more general limitation in their historical analysis of the abstract individual also. Whereas this defence is premised on the argument that by presenting criminal law as concerned with securing individualist values a vision of the moral foundations of criminal law is invoked which would enable the courts to supervise instrumental practices established by positive law, the critical analysis demonstrates that by locating the normative force of these individualist values in their recognition as a part of the moral life of the community they effectively replicate the vision of the normative foundations underpinning instrumental practices, and so fail to explain how those principles and doctrines informed by such values could be perceived to defend the autonomy of the criminal law. This indicates that whilst the emergence of the abstract individual may indeed be located in transformations undergone by the common law as criminal law became increasingly instrumentalised by the administrative state, and therefore linked to the view of law's foundation in the community, the argument that the concept of the abstract individual emerged to differentiate these practices on the basis of their foundations in moral values and positive law respectively appears misguided. On the contrary, if such principles and doctrines structured around the abstract individual are to be understood as defending the autonomy of the criminal law, the basis upon which they claim general normative force must speak directly to the manner in which the life of the community is increasingly ordered by positive law and the instrumental practices it establishes, rather than 'marginalising' or 'excluding' them from the vision of criminal law it invokes.

With Chapter One drawing from the prevailing literature important themes to guide the historical analysis conducted in the rest of the thesis, Chapter Two begins to develop the specific argument developed therein concerning the origins of the abstract individual in modern criminal law. Through an exploration of the origins of the Treason Trials Act 1696 and the reforms enacted therein, the chapter first outlines the manner in which abstract thought about the person emerged as an object of inquiry in criminal legal practices, and secondly contextualises this development within transformations in understandings of legal order more generally. The first task is conducted through an illustration of how the requirement that the accused's treasonous mind be evidenced by an overt act came to pose

a problem for traditional trial practice, in particular whether they had ‘compassed or imagined the death of the king’, as well as by analysing contemporary commentaries on one of the most notorious trials prior to the 1696 Act. It was shown that there existed a conflict of perspectives in how the overt act was perceived to establish the criminality which the trial sought to identify and punish. Whilst on the one hand there was the traditional view that the overt act by itself ‘naturally declared’ the treasonous mind to the court, this was opposed by a contrasting perspective asserting that the overt act alone was not enough to establish the accused’s treasonous mind, but that in addition it needed to be interpreted in light of surrounding circumstances that would connect the overt act to a particular harm prohibited by the offence. At stake in these contrasting perspectives was the integrity of received understandings of how the distinction between fact and law governed trial practice. Whilst the first perspective generally supported the traditional view of practice that assistance in presenting facts to the court would be an ‘artificial cavil’ obstructing the discovery of criminality insofar as they should ‘naturally declare’ guilt, the second view undermined it by raising the possibility that by themselves facts insufficiently established guilt, but that they needed to be interpreted in light of the law’s objectives, creating a space in which an argument for the necessity of counsel in matters of fact could be made.

Exploring the emergence of abstract thought about the person at the level of the trial practices and linking it to the more general phenomenon of abstraction in the conception of legal order emerging during this period generates certain important preliminary insights into the nature of the abstract individual in criminal law. In particular it identifies the emergence of abstract thought about the person in the sense of an exploration of the accused’s interior mental world as a technique employed as part of the law’s strategy of governing human behaviour through its rules and principles. The abstraction of the treasonous mind signified by the challenge to the belief that it was ‘naturally declared’ by particular overt-acts transformed criminality into a construction of legal discourse differentiated from any substantive understanding of criminality traditionally perceived to lie within the community. Moreover, this abstract concept of the treasonous mind is highlighted as a technique employed to constitute criminality as a phenomenon which is not only identified and punished by the law and its practices, but which can also be

represented within it as a form of knowledge about human society and incorporated into its own vision of order. At this stage of the argument a *prima facie* rebuttal can be made of those arguments associating the concept of the abstract individual with the claim, ideological or not, that it is a part of a strategy of legitimising criminal legal practices. On the one hand, rather than actively excluding the fact that criminal law protects particular interests identified by positive enactment, abstract thought about the person can be seen to have developed in a sense fully immanent to this aspect of practice insofar as it is an integral part of the law's strategy to render the protection of such interests more effective by transforming the identification of conduct dangerous to such interests into a form of knowledge about human society and incorporating it into its own sense of order. On the other hand, rather than being a manifestation of criminal law's rootedness in community values as opposed to those instrumental practices established by positive law, abstract thought about the person appears to operate here at the point where community and the instrumentality of positive law meet, insofar as it emerges to illustrate how the objectives defined by positive law can best be realised within the life of the community by refining an understanding of conduct dangerous to such purposes.

With Chapter Two through a particular focus on treason having established preliminary insights into the origins of the abstract individual by locating it at the point in the order of criminal law at which the objective of protecting interests identified by positive law is represented as a part of the life of the community, Chapter Three broadens the enquiry by looking at the emergence of the criminal mind in the seventeenth century more generally and goes on to locate this development within general philosophical reflections on the nature of law with the aim of developing a clearer understanding of the normative force attributed to the abstract individual in the theory and practice of criminal law. In particular it aims to locate abstract thought about the person in criminal law within developments in common law thought in the sixteenth and seventeenth centuries concerning the sources and authority of English law. First, it conducts an analysis of seventeenth-century works on criminal law by Coke and Hale, bringing forward the sense of the criminal mind as articulated in these works and going on to clarify their nature. It is seen that these authors put forward a specific concept of the criminal mind. Rather than being conceived of as a

formally distinct condition of liability subject to precise definition and requiring independent proof, it is presented as a source of evidence to be drawn upon in interpreting and applying rules of criminal law describing conduct interfering with interests identified and defined by the law. It is argued that the criminal mind on this understanding can be seen as a fundamentally interpretive concept, on the one hand constituted only by reference to general and abstract rules whilst nevertheless forming a necessary component in interpreting the scope and substance of those rules. The chapter then moves on to contextualise this sense of the criminal mind as an interpretive concept by exploring how such interpretive practices were theorised in works on legal reasoning and legal method in the late sixteenth and early seventeenth centuries more generally. An analysis of these works draws out how these problems were perceived to lie in a breakdown of an assumed unity between the order envisioned by law and the order inhering in the nature of those things towards which it was directed, triggered by a perceived complexity and diversity in society undermining the certainty of law at the level of its application in particular cases, but also bringing into focus the relationship between the claim as to the law's certainty in the abstract and problems confronted in its application. The significance of this view on the problem of uncertainty in law lay in the fact that, in addition to the traditional problem of the consistency of the substantive order defined by law with that found in custom or natural law, the question of the method through which human actions and relations were represented in the practice of governing behaviour through legal rules and principles was posed as a fundamental problem for legal order. Understood in such terms, therefore, the rules and principles comprising legal order are not assumed to reflect human conduct in a manner implying that the order inherent in that conduct is undifferentiated from its representation in law. On the contrary, as part of a notion of legal order differentiated from the 'natural order' of its environment the operation of rules and principles presumes that human conduct towards which they are directed is notionally distinct from its own system of representation, transforming such conduct into something resembling a body of knowledge which law must engage with and actively seek to bring within its own vision of order if it is to be effective in the aims or purposes that form a part of that order.

The chapter then goes on to draw links between this emerging sense of legal order and developments in common law theory of the seventeenth century more generally. An analysis of St Germain's *Doctor and Student* is conducted in which it is argued that, although he identifies custom as opposed to reason as a primary source of English law, a tension is evident in his account of their legal force between locating it in their reasonable quality on the one hand or pedigree on the other which broadly mirrors the problem confronted by the notion of legal order explored earlier in the chapter. At the heart of this tension between pedigree and reason is a vision of legal order's foundation as both rooted in the order inhering within life of the community on the one hand and positively defining those abstract interests that define it and whose protection are necessary to its preservation on the other. Clear parallels can be drawn between St Germain's view of the King's courts in seeking to reconcile this tension in recognition and application of those customs considered to enjoy legal force on the one hand and those interpretive practices surrounding Doddridge's notion of secondary reason identified and analysed in the previous section on the other, insofar as both aim towards representing the life of the community imagined from the perspective of interests formally and positively identified as objects of protection by the courts.

Having established a link between the vision of legal order and the assertion of custom as a source of English law, Chapter Three goes on to explore the manner in which the common law tradition imagined the authority of law to reside in its customary foundations, and trace developments in such thought across the seventeenth century. In doing so it seeks to illustrate how those interpretive practices surrounding the emergence of abstract thought about the person identified in the thesis so far eventually came to be accommodated within philosophical reflections on the nature of legal authority in the common law tradition, picking up in particular on the theme of the continuity of custom as a basis for understanding such authority. In analysing these developments a distinction is drawn between on the one hand a perspective associated with Coke, Hedley, and Davies dominant at the beginning of the seventeenth century and on the other hand a perspective associated with Selden and Hale emerging from the mid-seventeenth century onwards. In the first perspective, in order to secure the superiority of the common law's jurisdiction against the threat of encroachment from the King's prerogative on the one hand and

Parliament's power of legislation on the other, an inextricable identity between the common law and the life of the community is established by asserting the essentially unchanged nature of its customs since the time when society first emerged in England. From this perspective the continuity of the common law is asserted by interpreting its customs as transcending the threat of rupture posed by political events in the history of the English people and changes and developments in the social environment within which it operated. By contrast, whilst Selden and Hale also located the authority of the common law in a sense of its continuity, they sought to envision it in a manner which was much more responsive to the fact of change and development in English society, rather than seeking to transcend it. Hale illustrated this sense of continuity by invoking the image Argonauts ship understood as the same ship on its return as when it originally set off, despite the fact that through repairs and adaptations conducted during the course of its journey no original material element of it remained. Incorporating this more dynamic sense of continuity into his philosophy of the common law Hale rethought the nature of its customary foundation. Rather than being a direct source of the common law Hale envisioned custom as evidence provided in the usage and practices of the people as to the 'original institutions' they enacted and from which the common law was comprised. The continuity of the common law therefore rested precisely in its adaptation to changes in its environment insofar as changes in the people's usage of the law as evidenced in customary practice shone new light on the common law's institutions, revealing the need for developments in their interpretation and enabling it to realise its purposes more effectively.

It is argued that these developments in theorising the nature of the common law's continuity reflect an attempt to incorporate those interpretive practices which were a part of the emerging vision of legal order analysed in the thesis so far into a concept of legal authority. Whilst the vision of the common law's continuity articulated in the first perspective can be interpreted as a response to these practices insofar as the identity it establishes between the common law and custom posited the life of the community as the primary object of law and the most important source of its authority. However, by envisioning the continuity of law as transcending change and development in society, it assumed an identity between legal order and the order inhering in the life of the community

which failed to capture the importance of those practices which took the latter as a distinct object from the former and which were specifically directed towards representing the latter within the former so as to more effectively realise its task of governing society. It is argued that the vision of the common law's continuity developed by Hale and Selden marks an attempt to develop a concept of legal authority which captures this dynamic in legal order which earlier thought overlooked. By representing the usage of law as embodied in custom as evidence of the institutions comprising the common law, Hale manages to both posit the life of the community as an object distinct from legal order insofar as usage is merely evidence of the common law's institutions rather than identical with them, whilst simultaneously asserting an essential inseparability between them insofar as such institutions can only be known through the observation of such usage. Rather than assuming a unity between the order of the common law and that inhering in the life of the community as the Cokean perspective dominant in the early seventeenth century had done, Hale makes the realisation of the order of the common law within the life of the community the essence of its claim to continuity and the basis of its authority, capturing in the process those interpretive practices through which this sense of legal order was constructed and maintained.

Whilst Chapter Two argued that abstract thought about the person emerged within practices through which criminality was differentiated from the moral judgment of the community and transformed into an object of legal discourse aimed at representing dangerous conduct so as to more effectively protect interests identified by criminal law, Chapter Three connects these developments with the sense of the criminal mind being articulated more generally in seventeenth-century criminal law and locates these practices specifically within a vision of legal order being developed through philosophical reflections on the nature and authority of the common law throughout the seventeenth century. In doing so it allows us to gain further insights into the normative force of the figure of the abstract individual in modern criminal law. As was seen in Chapter One, two perspectives on the normative force of the abstract individual are evident in the prevailing literature. On the one hand, Norrie and Ramsay associate it with the application to criminal law of a liberal individualist ideology emerging from the period of Enlightenment in the eighteenth century,

whilst on the other hand Farmer and Lacey associate it with the enforcement of community values through the criminal law. The argument developed in this chapter can be seen as an attempt to further the insights provided by these accounts. In relation to Norrie and Ramsay the argument draws upon the insight that the normative force of the abstract individual in criminal law is associated with the increasing importance of positive law within its practices in identifying those interests in need of protection insofar as the analysis highlights how philosophical reflections on the common law moved away from the idea of custom as its direct source, envisioning it instead as comprised of institutions authoritatively recognised and interpreted solely by the positive declarations of the King's courts. However, by highlighting how philosophies of the common law attempted to incorporate the role of positive enactments within a general vision of law as ultimately rooted in the life of the community, the argument may also be seen as seeking to go beyond the opposition Norrie and Ramsay pose between positive law and community as a consequence of their focus upon how the former takes judgments of responsibility out of the hands of the latter. Given that Norrie and Ramsay's account of the origins of the abstract individual in the ideology of liberal individualism is premised directly upon the opposition between positive law and community, by questioning this opposition the analysis conducted in this chapter indicates the possibility of developing an alternative account of the normative force of the abstract individual which acknowledges the importance of positive law without overlooking the common law origins of criminal law.

As will be recalled from Chapter One, Farmer and Lacey attribute the normative force of the abstract individual to the manner in which it invokes the common law origins of the criminal law, speaking to a vision of it as ultimately founded upon community values which stands opposed to those instrumental practices which dominate so much of its actual practice. However, it was also argued there that characterising the protection of the abstract individual in criminal law as securing community values effectively replicates the normative foundation upon which those positive laws enacting instrumental practices are legitimised, and as such it was difficult to see how the common law origins of the criminal law could be invoked by presenting it as protecting such values, nor how it could defend the autonomy of the criminal law against such instrumental practices. Whilst the analysis

conducted in Chapter Three draws upon the insights emerging from Farmer and Lacey's argument insofar as it also focuses upon the common law as part of an inquiry into the normative force of the abstract individual in modern criminal law, the argument developed therein can also be seen as part of an attempt to overcome these potential limitations. In arguing that developments in theories of the nature of the common law during the seventeenth century reflected an attempt to incorporate those interpretive practices surrounding the emergence of abstract thought about the person explored in Chapter Two, an alternative perspective on the place of the abstract individual within the order of the common law emerges which identifies it as an important technique aimed towards realising the protection of interests identified by positive enactment within the life of the community by representing within legal order that conduct most dangerous to it. From this perspective the normative force attributed to the abstract individual within the order of the common law is of a very different character from that envisioned by Farmer and Lacey. Rather than representing a community value which criminal law secures, the abstract individual takes on an instrumental quality as an integral part of how interests are protected within the order of the common law.

Chapter Four conducts an analysis of major criminal law treatises from the eighteenth and early-nineteenth centuries in order to trace the gradual recognition of the abstract individual within criminal law doctrine. Drawing upon insights gained from the work of preceding chapters identifying the emergence of abstract thought about the person in the practice of criminal law and locating it within the order of the common law, the chapter aims ultimately to justify the image of the 'lawless spirit' invoked in the title of the thesis in association with the portrait of the person in criminal law. The chapter traces the emergence of the abstract individual in relation to two specific offences: arson and fraud. Beginning in the seventeenth century with Edward Coke's *Third Part of the Institutes* up until the early nineteenth century with Edward Hyde East's *A Treatise of the Pleas of the Crown* and William Oldnall Russell's *A Treatise on Crimes and Misdemeanours*, an account of the emergence of the abstract individual is presented illustrating how the invocation of the accused's state of mind as a basis for attributing liability was an important technique in more effectively asserting the jurisdiction of the criminal law over an increasingly diverse

and complex social environment. In relation to arson, a development in the offence is outlined in which the criminality of the offence is increasingly differentiated from the traditional requirement that the act of burning be accompanied by personal malice borne towards the victim and towards a more general notion of malice constituted by abstract states of mind rather than particular motives. The incorporation of arson into the general 'malicious mischief' category of offences introduced by Blackstone, and adopted by East, is identified as a key point in the transformation insofar as it transformed the notion of malice traditionally required by the offence from a force of criminality which would manifest itself to the jury from the circumstances surrounding the act of the burning into a concept employed to represent conduct dangerous to identified interests within the order of the criminal law. The weakening of the requirement of personal malice and the emergence of a more general notion of malice is shown to be underpinned by a transformation in the perception of how law directed itself towards identifying criminality as it came to be motivated by a policy of securing social relations through which property rights were enjoyed, representing in a general and abstract manner those elements dangerous to it within the order of the criminal law rather than drawing upon the community's perception of threats grounded in particular motives governing personal interaction. A similar pattern is outlined in relation to the development of fraud whereby the emergence of the abstract individual in the offence is linked to the attempt to more effectively assert the criminal law's jurisdiction over an increasingly diverse and complex social environment through the representation within its order of conduct dangerous to specified interests. The criminality of the offence was increasingly differentiated from the traditional perception of it lying in the usurpation of another's personal authority manifested by counterfeiting or altering legal instruments in their name, eventually coming instead to be located in a more abstract concept of the fraudulent intent lying behind the accused's act. It is shown how this development was triggered by the increasing prevalence of the use of private instruments throughout society. As false names were frequently used in order to secure superior credit, this posed a challenge to the traditional perception of the criminality underlying the offence as no one's personal authority was necessarily usurped. Moreover, the idea that fraud entailed a particular harm to a specific victim was weakened as not only did it need to be established whether the victim gave credit to the person of the accused or the fraudulent instrument, but the use of false names or the names of others also undermined the integrity

of instruments more generally even if there was no specific victim. Against this background the making of fraudulent intent as the basis of liability for the offence is shown to be a technique through which the criminal law sought to more effectively secure those social relations within which private credit instruments operated by drawing upon the community's usage of such instruments and representing conduct dangerous to their integrity within the order of the criminal law.

From the analysis conducted throughout the thesis it can be seen how the image of the lawless spirit speaks to two different dimensions of the concept of criminality being forged in modern criminal law in relation to which the person before the law came to be represented as an abstract individual in its practices. On the one hand, the idea that the court directs itself to identifying a lawlessness in the person that comes before it speaks to a concept of criminality with the perception of the community at its core. Understood as inhering in the defendant's character, lawlessness is something which is both constituted by the community, insofar as determination of those acts and circumstances which manifest lawlessness resides in the community's perception of what threatens or undermines its order, as well as being directed towards the community, insofar as the lawlessness is attached as a label to the defendant in order to communicate to the community the presence of a dangerous element. On the other hand, locating this lawlessness in the spirit of the defendant speaks to a concept of criminality in which what is perceived by the community is transformed into an object to be represented within discourse. The idea of spirit as animating human behaviour but yet distinct from surface appearances removes lawlessness from the direct perception of the community, constituting it as a distinct concept from those particular acts and circumstances in which it may be perceived by the community to be manifested. At the same time, however, the lawless spirit cannot be conceived of independently from the idea of lawlessness, and as such the specific shape and content of the lawless spirit can only be constructed in relation to the community's perception of those acts and circumstances deemed to manifest lawlessness. The lawless spirit thus marks the transformation of the community's perception of criminality into an object of discourse, insofar as taking lawlessness as a phenomenon existing within the perception of the community as its object founds the possibility of the discourse, whilst

simultaneously abstracting and differentiating itself from that perception and positing itself as something conceptually distinct.

The image of the lawless spirit can be seen to mirror the concept of the abstract individual of modern criminal law developed throughout this thesis. It has been argued that the abstract individual was forged within the criminal law's attempts to represent the life of the community within its own order. Whilst the emergence of the abstract individual in criminal law has been shown to be linked to the increasing prevalence of positive law within its practices, it has also been shown that to associate it with the exclusion of community from its foundation is misguided. The abstract individual should instead be seen as the primary manifestation of the attempt to realise the order of the criminal law based upon identifying interests for protection in positive enactments within the life of the community. The manner in which the concept of criminality associated with the abstract individual reflects this can be seen in two senses. On the one hand, locating criminality in the defendant's interior world removes it from the immediate perception of the community by denying that any particular act or circumstance can directly manifest it. In the process the finding of criminality is differentiated from the community's evaluation of those interests deemed worthy of protection and instead made contingent upon the identification of particular interests by positive enactment towards which the defendant must possess a particular state of mind. It is in this sense that the abstract individual is linked to the increasing dominance of positive law in the practice of criminal law. On the other hand, however, it has been argued that locating criminality in the defendant's interior world does not merely reflect its positivisation through exclusion of community from its concept. Whilst locating criminality in the defendant's state of mind transforms it into a construction of discourse differentiated from criminality as directly perceived by the community, the conceptual distinction it imposes between criminality and the external world means that the specific content and shape of criminality can only be established by reference to acts and circumstances that may manifest criminality within the perception of the community. The location of criminality in the defendant's state of mind therefore forms part of an attempt to represent the community's perception of criminality within an order of criminal law where interests to be protected are identified by positive enactment. It is in this sense in

which the abstract individual can be identified as the concept sitting at the very heart of how the criminal legal order realises its aims within the life of the community. Moreover, the manner in which the abstract individual indicates a concept of criminality both differentiated from the perception of the community as well as necessarily drawing upon it establishes its character as the lawless spirit.

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